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Henry Barber
May 24 1845.
68

The SECOND PART
O F
C A S E S
Argued and Decreed
I N T H E
HIGH COURT
O F
CHANCERY,

CONTINUED

From the 30th Year of King *CHARLES II.*
To the 4th Year of King *JAMES II.*

L O N D O N,

Printed by the Assigns of *Rich. and Edw. Atkyns* Esquires,
for *John Walthoe*, and are to be sold at his Shop
in the *Middle-Temple-Cloysters*. 1701.

THE SECOND PART

CASES

Argued and Decreed

IN THE

HIGH COURT

OF CHANCERY

CONTINUED

From the Year of King CHARLES II.
To the Year of King WILLIAM II.

By W. D. A.

Printed by the Author, at the Sign of the Anchor, in the Strand, near the Temple, in the Year 1751.

A

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O F T H E

N A M E S

O F T H E

C A S E S.

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TO THE
Right Honourable
S^{IR} Nathan Wright K^t

Lord Keeper of the Great Seal of *England*, and
One of the Lords of His Majesty's most
Honourable Privy Council.

My LORD,

THE following Sheets humbly present themselves
to Your Lordship's View, no ways presuming
on their own Worth or Merit, but wholly con-
fiding in Your Lordship's Goodness to accept 'em.

*The Author (if I am rightly informed) was, when
living, for many Years a Practiser of the first Rank,
in that High and Honourable Court of which Your
Lordship is now the Head, and greatest Ornament.*

*The Subject Matter being Equity, it carries some-
thing of Pretence (with Your Lordship's Pardon and
Permission) to be addrest to Your Lordship, as the Foun-
tain of Equity.*

You

The Epistle Dedicatory.

You have, My Lord, not only the Custody of His Majesty's Royal Seal, but You are the Great and Just Dispenser of the Royal Equity and Conscience; and, I hope, of Mercy too, in forgiving the Confidence of this Address.

My Part herein has been little more than Midwifing into the World another's Orphan-Issue: And I was glad of finding this Occasion publickly to profess my self,

My Lord,

Your Lordship's most Humble,

and most Obedient Servant,

J. W.

D E

Term. Sanct. Hill.

Anno Regis 30 & 31 Car. II.

In

CANCELLARIA

Bland *and* Middleton.

By Will in writing J. S. leased in Fee deviseeth Land to his Daughter E. and her Heirs; and his mind is, if his Son A. pay to her 50 l. then his Son should have that Land; the Mony was not paid at the day appointed by the Will; the Daughter sells the Land, it was decreed by the Lord Chancellor against the Tender, he paying the Mony, for he took it but as in the nature of a Security, though it was objected by Sir Fr. Winnington, that this is a contingent Devise to the Son on payment, and then too, if he had performed and paid, he could have had but an Estate for Life, the Remainder or Reversion in Fee to the Daughter.

Heir relieved a-
gainst Wife De-
visee for her
Life.
Devise.
Condition.

Note, 'Tis no reason, that his Father should give the Son a greater Estate in Equity than the Will in writing, gives him on performance of the Condition by the express words of the Will in writing, and the Will cannot be of Land, but in writing: So as if the Testator having made such Will in writing had by Parol declared that the Son should have the Fee simple on Payment, it should not avail; yet it was decreed, ut supra. Quære si bene.

Morley *versus* Morley. 15 February, 1678.

Trustee robbed.

THE Defendant was Trustee for the Plaintiff an Infant, and received for him 40 l. in Gold, a Servant of the Defendant living in the House with him robbed his Master of 200 l. and the 40 l. out of his House. The Robbery, viz. That the Defendant was robbed of Money was proved; the Sum of 40 l. was proved by only the Defendants Oath.

Lord Chancellor. He was to keep it but as his own, and allowed it on account; so in case of a Factor, so in case of a person robbed, for he cannot possibly have other Proof.

Anonymus. 25 Febr. 1678.

Damage for Legatee.
Demand tho' no Relief by the Bill.

A Suit was begun for a Legacy and to discover Assets, no Assets sufficient being discovered; after other Assets came to the Executors hands, and a second Bill for the Legacy, and Assets thereon discovered, and the Lord Chancellor gave Decree for the Legacy, and Damages from the first Bill exhibited; for that was a good demand of the Legacy, though it was not presented and not only from time of Assets.

D E

Term. Sanct. Mich.

Anno Regis 32 Car. II.

In

CANCELLARIA.

Bevan *versus* Dike. 27 Novemb. 1679.

THE Plaintiffs Wife and Administratrix to her Husband sues Dike Mortgagor of a Dye-house and Vessels, but the Administration was repealed because she was married, and it was said at the Bar, that she was so sentenced because she was married by a Non-Conformist Minister: But it was but said, and to that saying the Chancellor said it might be allowed as well as by a Romish Priest, or he said to the like effect; but nothing proved. The Cause being heard, the Court in regard of the Repeal of the Administration could not relieve her, but in the proof it appears she had another Title not set forth in the Bill nor put in the Issue, viz. That the Mortgagor before Witness gave 2 s. 6 d. to the Vicar and declared, that the Plaintiff should sell the House, pay the Mortgage, and with the House and Trade of Dying maintain her self and Children, so that it was a Parol Declaration of a Trust.

Relief on Matter not in Issue.

Object. It is not alledged nor in Issue, therefore, &c.

Chancellor. Where I see Right I will have it tried ere I decree against it, and it is no inconvenience, for the inconvenience is because the other side cannot examine to what is not alledged, but at the Trial he may, and so directed a Trial on that Point.

Anonymus. Novemb. 27. 1679.

Heir helpt a-
gainst Wife De-
visee.
Discovery.

THE Husband devised Lands in question to his Wife for Life, the Son exhibits a Bill pretending the Devise to the Wife void, because 25 Eliz. the Lands were entailed to his great Grandfather, to whom he was Heir in Tail; and to discover the Deed in Tail, the Wife confesseth writings in her hand; she is ordered to bring in all the writings, and it fell out that the Deed of Intail was among the rest. The Heir by a Motion ex parte gets all the writings out of Court, and, on Motion after was ordered to bring them in again, and they are now in Court.

At the Hearing Mr. Keck prays that the Heir may not make the Court an Instrument to help the Heir to the Deeds, but that she the Defendant may be in the same Condition as she was before the writings brought in by her in Obedience to the Court, for though the Devise was voluntary and not in pursuance of Articles in Marriage, yet unless the Heir would confirm her Estate, he ought not to be assisted by the Court, for there is a Consideration (to wit) to provide for his Wife, and so had it been if the Father had in like manner devised to younger Children, for the Consideration in Law is good, (Wife) to raise a Use at Common Law.

He affirmed there were Presidents for him, and the rather because the Father had power to dock or bar the Intail.

Chancellor. I will never help the Issue against a Purchaser, but here it is a Bounty in this Case, and in such Case the Heir having a good Title shall be aided; and decreed the Deed to the Plaintiff.

Anonymus. Novemb. 27. 1679.

Real Estate
made liable in
lieu of the per-
sonal.

THE Case was. The Father seized in Fee mortgaged the Land and gave a Statute to the Mortgagee to pay &c. and made his Will, and devised 500 l. to his Daughter and died, the Mortgagee took so much of the personal Estate in Execution on the Statute that thereby there was not sufficient Assets left to pay the Legacy.
The

The Question was now that the Heir was discharged or eased of the Debt out of the personal Estate liable to the Legacy; if now the Daughter should have relief against the Heir, who was eased out of the personal Estate which was liable to her Legacy; and it was decreed for her.

Chancellor. Where the Heir is indebted by Mortgage made by his Father, or by other means as Heir to his Ancestor, the personal Estate in the hands of the Executor shall be employed to pay that Debt in Case of the Heir; but if there be not Assets to pay other Creditors or other end of the Testator on his Legacies, the Heir shall not turn his Charge on the personal Estate. In this Case here was sufficient to pay the Debt by the Mortgage, &c. and the Legacy out of the personal Estate, and when both can be satisfied both shall be satisfied; and the Contribution to make the personal Estate liable to the Legacy towards satisfaction of the Mortgage (looks like a fraud) and shall not prejudice the Legatee, but she shall have recompence against or upon the Mortgage though originally not liable to her. And my Lord cited several Presidents decreed upon the same reason.

Heir Executor.

Management of the Estate.

Legate *versus* Hockwood. Nov. 27. 1679.

THE Plaintiff bought of the Defendant five sixteen Parts of a Ship, which he had formerly sold by Bill to the Plaintiff, and gave him Bond for the Money, and after the first Bill kept the Bill, saying, he would keep it till he were paid, and being after requested to make a Bill of Sale to the Plaintiff, refused to do it; the Plaintiff pleads, that by reason thereof he could not dispose of his Interest, for though he had Title by the verbal Sale, yet none would deal with him on such terms without a Bill of Sale to make out his Title, but he did not instance in any particular person, who refused to deal with him: The Plaintiff sent the Ship to Sea, which made a losing Voyage, at her return to England, the Defendant then profered a Bill of Sale, but the Plaintiff refused it, and now sues to have up his Bond though he had not paid the Money.

Money secured by Bond discharged the Assurance denied on Demand. Consideration. Assurance.

Chancellor. When the Ship was sold it is implied, that the Vendor should make Assurance by Bill of Sale, but not unless it be demanded: Was it demanded?

The

The Council for the Plaintiff read and proved a Demand.

Keck. Here is a Bargain executed, Security for the Money given, Possession taken by the Plaintiff, and the Ship employed by him and safe returned, and we pray to have our Money according to Security to us for our Ship given, which he hath.

Chancellor. When you had Security you ought on Demand to have made Assurance; if a Man buy Lands and secure the Money, if he who sells will not make Assurance, when reasonably demanded, he shall lose the Bargain, therefore decreed the Bond to be delivered up and the five Parts, &c. reassigned to the Defendant.

Fashion and other Creditors of Anthony Pearson deceased, Plaintiffs, against Atwood Executor, and John Atwood and against the Debtors of Anthony Pearson and Ralph Pearson Administrator de Bonis of Anthony Pearson Defendants, On the Hearing 4 December 1679. The Case was.

Parol Assignment of Debts,

John Atwood a Merchant in Norwich, deceased, employed Anthony Pearson deceased, as his Factor in London, to sell Stuffs for him, and did charge him with great Sums of Money by Bills of Exchange, many of which Pearson accepted, and finding that he had accepted more Bills than Assets to satisfy, complained thereof to Atwood, who thereupon willed him to go on, and agreed that he should sell the Goods, and dispose of Goods and Debts as his own to secure himself; which he did, and sold to the Defendants, and entered them in his Accounts in his own Name, and the Buyers (some of the now Defendants) knew not whose Goods they were but bought them of Anthony Pearson; two days after the Agreement John Atwood, the Merchant, died; afterwards Anthony Pearson, the Factor, assigned those Debts so contracted to Packer, another Defendant, to the use of the Creditors of Anthony Pearson, and dyeth. The Scope of the Bill was, That accordingly the said Debts may be employed to the use of the Creditors of Anthony Pearson according to the Assignment.

B.

B. Atwood, Executrix of John Atwood, opposed it for that she was subject to Demands of divers persons by Bond, which Debts by Bond are to be paid before any Debts by verbal Agreement; and though Pearson sold the Goods of Atwood to the Defendants, yet Atwood might sue for the Debt in his own Name (which was not denied) and though in Atwood's Life-time he could not avoid his Agreement, yet the Case is altered by his death; for himself was equally lyable to his verbal Agreement as his Bond; but the Executor is not so, for he must pay Bonds before simple Contracts.

It was said for the Plaintiff. Debts though not assignable in Law are on good consideration assignable in Equity, and though the property of the Debt be not altered, yet it binds Atwood, the Assignor, and consequently his Executor: So as the one nor other can avoid it in Equity, and there is no danger of Devastavit to the Executor; for it cannot come to the Executors hands, for the Executor is bound by the Assignment as well as the Testator, and till it come to his hands the Executor cannot be charged.

The Attorney General objected. The Creditors by Bond are now concerned, for they ought to be preferred before a verbal Agreement, and the Executors for them in their behalf.

The Chancellor seemed to incline much against the Plaintiff, but directed a Trial on this Point, viz. If there were any Agreement between the Factor and Merchant, that the Factor should have the Debts for his Security.

It was insisted on as a Custom between Merchant and Merchant that all Accounts should be evened on either side by way of Estoppel, when the Business was of the same employment, &c.

Temple *contra* Rowse. Decemb. 8. 1679.

A Decree was made, and before Costs taxed, the Plaintiff died, and a Bill of Revivor brought and disallowed by the Lord Chancellor, On Plea que ne gis-
pour costs. No Revivor for Costs only.

Wakelin *contra* Walthal. Decemb. 8. 1679.

Verbal Agree-
ment no stay to
Execution of a
Decree.

A Decree being pass, the Defendant to a Bill to execute the Decree, set forth a Parol Agreement in Bar; to which Answer the Plaintiff demurs, and the Chancello^r allowed the Demurrer though the Agreement were subsequent to the Decree; the Decree shall proceed, and if the Defendant will have advantage of the Agreement, let him bring an Original Bill, for if he have advantage by it in way of defence, one witness may serve his turn, but to an Original Bill here if he in his Answer deny the Agreement, one witness will not convict him, so as by this way of Answer the Plaintiff should lose the benefit of his Answer.

Anonymus. 9 Decemb. 1679.

Stat. Car. II.
Will.

Mortgago^r after Forfeiture by Will in writing since the Statute, and attested only by two witnesses, devised the Land, and upon Tryal a Verdict against the Validity of the Will; for the Question at the Trial was not on the Point of Equity, whether the Equity of Redemption passed by the Will, but whether the Lands passed, the Mortgage being then unknown, but discovered since?

And now Mr. Eccleston moved, That this is not within the Statute which nulls such Wills only in case of Devise of Lands by vertue of the Common Law, Statute or Custom, but a Devise in Equity is not good either of those ways.

Devise.

Chancellor. I cannot tell that, but before the Statute if a Mortgagee before the Condition broken devise, &c. it is void, for a Condition is not devisable, but after Forfeiture the Equity of Redemption is devisable.

Hodges

Hodges *contra* Waddington. 11 Dec. 1679.

THE Question and Case was. An Administrator Executor, pend-
possesseth himself of the Intestate's Goods, and de- ing a Suit for
viseth Legacies and dyes, his Executor voluntarily with- the Estate, vo-
out compulsion of Suit pays the Legacy, therè then be- luntarily pays a
ing a Suit in right of the Intestate, to recover the Goods, Legacy, the E-
and after that the Goods are evicted from the Executor; state is evicted,
so that now he hath not nor truly had Assets for the Le- he is remediless.
gacy: The Executor sues to have back from the Legatee Executor.
what he paid, and in truth was not bound to pay, but vo- Eviction.
luntarily did. Loss.

The Lord Chancellor advised: But in the same day in the Afternoon the Lord Chancellor dismiss the Bill, because the Executor paid the Money voluntarily without Compulsion by Suit. And 2dly, with his Eyes open when he knew that the Estate was in question, so he was aware of the danger of the Action. If the Suit for a Legacy be in the Ecclesiastical Court they make the Legatee give Security, because when the Legacy is paid they cannot restore, &c. And here the Court decrees a Legacy without Security (unless in case of Poverty or the like) for this Court can reach the Legatee again if there be cause.

Trethewy *contra* Hoblin.

Trethewy purchases of Francis Hoblin, Son and Heir No Costs of
of Thomas Hoblin Lands called Bawdo, and by ano- Trial if the Ti-
ther Purchase purchases Penhale Prideaux, and had Port- tle not good,
gage of Penhale sans addition, and Penhale Hungerford, but probable.
the Purchase-money and Debt 3000 l. the Estate of Pen-
hale and Hungerford was in Reversion after a Jointure
to old Hoblin's Wife.

Trethewy's Bill was against Thomas Hoblin, the younger Son, and Hawky an Attorney. The Equity was to discover Incumbrances, examine Witnesses, have up the Evidences and Writings, which the younger Son being Executor to his Father hath, and to be enabled to try the Title, which he could not do without aid of this Court during the Jointress's Life.

A Trial was in Devon for Penhale, but set aside on Certificate of the Judges coram quo, &c. And a new Trial in Banco Regis by a Jury of Middlesex touching Penhale, which past against Trethewy, and a Trial for Bawdo, which was claimed by Hawkey, which past for Hawkey.

The Cause was now heard again 16 December, 1679.

The Point in debate was, Whether Trethewy, who had lost his Bond and Security, and had a probable Cause of Suit, should pay Costs at Law or here?

The Lord Chancellor ordered not any, but the Defendant might enter Judgment at Law, but no Costs there.

Green & Mary Uxor, contra Hayman, &c.
19 Decemb. 1679,

Estates transposed to maintain the intent of the Will.
Devise.

THE Case was. George Rook, Grandfather of Mary, seized in fee, devised the Lands in question to Lawrence his Son, Father of Mary the Plaintiff, and also of the Defendant Hayman Rook for the Life of Lawrence only, Remainder to the first Son of Lawrence, and the Heirs Males of such first Son, and so to the other Sons in præfat' terminis; the Remainder to John Brown and Lancelot Johnson, &c. for their Lives on Trust and Confidence in them reposed for the better securing of the several Remainders before limited; the Testator dyed, Lawrence before any Son born, by Lease and Release makes J. S. Tenant for his Life, and suffers a Common Recovery to the use of himself again for Life, and a Remainder for years to the Trustees to raise 1000 l. Portion for his eldest Daughter, and then afterwards hath Issue the Plaintiff Mary and the Defendant Hayman Rook, his Son and Heir, and dyeth. The Suit is for the 1000 l.

The Defence by Plea was, That Brown, &c. the Trustees, to preserve the Contingent Remainders to the first, second, &c. Sons are living and consequently the Estates contingent not barred by the Recovery.

Against which it was objected, that Lawrence, till a Son born, was Tenant in Tail, and the Estate to Brown, &c. a Remainder after, and not before the Entail to Lawrence, and so

so is barred by the Recovery, and could not preserve it self, a fortiori, not the contingent Remainders precedent.

After Debate the Lord Chancellor allowed the Plea, for the Law will manage and marshal the Will according to the intent, which here was to preserve Contingent Estates limited in place after the Contingencies; but if it so should stand in Construction of Law it cannot preserve them, therefore clearly shall be construed before them.

William Mellish Esq; Plaintiff, the Royal African Company and Richard Edlin, Defendants.

The Case.

IN October, 1672. the Company chose the Plaintiff Merchants of to be their Agent General and President of their Council the African cil at Cape Corra in Africa, which Council was to consist of the Agent General, and a first Merchant, and a second Merchant; the first Merchant was to be Gold taker, the second Merchant Warehouse-keeper, and the Plaintiff was to have a Salary of 400 l. per annum, two third parts of which was to be paid in Africa, and the other third part in England, when the Company had allowed his Accounts; and the Company gave the Plaintiff an Establishment of Rules by which to guide himself. And by which the Dut-Factories were also to be guided, by which Establishment the Dut-Factories were to send their Accounts to the Company of all their Transactions, and gave the Company Security to be accomptable to them for all what they received and paid for them. And the Plaintiff and Council were also to take the Accounts of the Dut-Factories and enter them in their Books, which were kept for the Company at Cape Corra Castle.

All the time the Plaintiff was there (which was three years) the Defendant Edlin was (for want of a third person) both Gold-taker and Warehouse-keeper.

The three years being ended the Plaintiff and Edlin came home, and having delivered up his Accounts and Papers to Mr. Hodskins his Successor at Cape Corra, sent the Company according to their Establishment just Accounts from time to time of all their Transactions.

The Plaintiff expected the Remainder of his Salary, but the Company sued him at Law for all their Goods sent, and got Judgment (Quod computet.)

To be relieved against which Suit, and have the Remainder of his Salary is the Scope of the Bill.

13 July, 1675. The Cause came to be heard, and decreed,

1st. That the Plaintiff should account with the Company as their Agent General in the said Trade at Cape Corfa Castle.

2dly, That Edlin should be admitted Warehouse-keeper throughout the Plaintiffs Agency.

3dly, That in making the Account the Plaintiff is to be discharged of all Goods delivered into the Warehouse at Cape Corfa Castle, and went to the Out-Factories and were delivered there, or that were not delivered there through the default of the Master of the Ship, or any other accident.

4thly. That the Plaintiff should be charged with all Goods belonging to the Company, which he or any by his Order took out of the Warehouse and disposed of; and with all Goods that went to other Factories which were afterwards imbezilled by him or his Order, or for his use.

5thly. That the Plaintiff should be charged with such of the Companies Goods as came to Cape Corfa Castle, and were not delivered into the Warehouse, nor consigned to any other Factory, but came to the Plaintiffs hands or use.

6thly. And if any Goods came to any Out-Factories and Product had been answered the Plaintiff, and he hath not answered it to the Company, the Plaintiff is to be charged therewith.

7thly. And that in this and all other matters of the Account, wherein the Plaintiff is charged he shall not be allowed any thing in discharge, but what he proves.

And that in all Cases not before directed where Edlin may be charged, the Plaintiff is to be discharged.

That this Order was entred according to the Minutes, and the Defendants acquiesced under the Decree so far as to bring in their charge before the Master, and accepted a Discharge, and took a Warrant to attend the Master on the Discharge.

But

But instead thereof petitioned the Lord Chancellor to rectifie the Order, and would have the Plaintiff charged with the Monies demanded by the Dut-Factories in their Accounts which they sent the Plaintiff during his residence at Cape Corfa, the Petition alledging that near 1000 l. is demanded by the Plaintiff in his accounts in gross for Charges allowed by him in the accounts of the Dut-factories without the producing the Vouchers.

In answer to this Petition, the Plaintiff ought not to be charged with the Demands of the Dut-factories, for he knows not nor is concerned whether those Demands be just or unjust, nor can he allow or disallow of them, but must take them as they were given; and if they are false accounts the Dut-factories are liable to the Company, to whom they by the aforesaid Establishment are to account and give Security so to do.

Vide the 13th Article in the Establishment to prove the Company did direct the Under-factors should all account to the Company in England, of

all Goods they received and sold, and send to the Company by every Ship a Copy Journal of all the Proceedings; and notwithstanding that accounting to the Company in England they were to account to their Agent and Council at Cape Corfa, so as they might inspect all their Actings, and keep perfect Accounts with them in the Companies general Books at Cape Corfa. *Vide the Securities the Company usually took of all their Factors in Guinea being in their Custody.*

2. Its not reasonable to charge the Plaintiff with what he never received, for the Dut-factories returned him no more Effects than what came clear after the deduction of their Demands, which deductions were made by themselves, and not by the Plaintiff; nor could the Plaintiff and Council at Cape Corfa refuse such Effects as they sent or brought thither, if they had, the Company might have complained for that cause.

3. As to the Allegation of the Petition that the Plaintiff demands gross Sums for Charges allowed in the Dut-factories accounts, there is no such thing the Plaintiff making no demands; there being only entred according to the Companies said Establishment in the Books kept at Cape Corfa for the Company the general and total Sums demanded by the Dut-factories for what they disbursed, nor is there any occasion for the Plaintiff to make any such demands, for being not chargeable with what Goods were sent to and received by the Dut-factories, he cannot be charged with their disposal of them, and so hath no occasion to demand any such allowance.

4. As

4. As to the charging these accounts in the Companies Books kept at Cape Corfa Castle in gross Sums it was no Crime in regard it was the usage, and also for that by the Company's said Establishment the Out-factories were themselves to render an account of all their Receipts and Payments, and for that purpose gave Security as aforesaid to the Company, and the Plaintiff and Council had the Vouchers at Cape Corfa Castle when these Sums were entred.

Company's Letter to Agent Hodgkins to prove this Order.
Ja. Nightingale proves the burning of the Papers.

5. And as to the Objection, that the Out-factories accounts themselves are not produced the Company by their Letter dated 25 January, 1675. gave Mr. Hodgkin's Order to take from the Plaintiffs and Edlin all their concerns; whereupon never having any Order to bring them or send them to the Company, and seeing the Companies Order delivered up all the Out-factories Accounts and Letters which were many thousands, to Hodgkins, who was proper to have them that he might see how matters stood; which Papers were since the Plaintiff came to England, burnt by one Croxton the Company's late Agent, with which the Company being not satisfied petitioned the Lord Chancellor for these accounts, who the 22d of March last ordered that the Plaintiff should swear he left them with Hodgkins which should conclude the Company, which the Plaintiff had done. Vide Order and Affidavit.

D E

Term. Sanct. Hill.

Anno Regis 31 & 32 Car. II.

In

CANCELLARIA.

Bodly contra

Bodly gave Bond of 500 l. to the Brother of the Defendant, conditioned to pay to the Defendants Sister (Party also to the Bill) 50 l. and to maintain a base Child paying a certain yearly Sum for it. There was no place in the Condition where the 50 l. should have been paid. The Plaintiff by his Bill offers Payment of the 50 l. and brought it into Court, and the Defendant set forth by answer that the Plaintiff was Suter to her in way of Marriage, but abused her and left her, and thereupon the Court refused to grant an Injunction to the Plaintiff against the Suit on the Bond; the Plaintiff replied and acknowledged he was a Suter, and really intended Marriage, but that after he had begun to woo the Woman, he was informed, as the truth was, that she had formerly been taken in a Bed with another Man, and that this was known publicly, and her father trepanned him to woo her, &c. he being a young Man in Oxford. Yet now the Lord Chancellor denyed the Injunction saying, this Court should not be a Court to examine such Matters.

Iniquity takes
away Equity.

Winkfield

Winkfield *contra* Combe. 1679.Accident Testa-
ment.

F Winkfield having a Son and other Children married the Plaintiffs Mother, and five years before he died made his Will, and taking notice therein that his Wife was enseint, devised 1000 l. to the Plaintiff; and if the Child en ventre sa mere were a Daughter then she should have 1000 l. but if a Son, then that his Executors should purchase 100 l. per annum, and settle the same on the Son and his Heirs Males of his Body, and if he died without such Issue, to the Plaintiff; the Wife is brought to bed with a Son who dyed in the Life time of the Father, then the Father died and his Wife enseint with a Daughter to whom no Portion was left or other Provision. And the Plaintiff exhibits her Bill to have the Land purchased and settled on her, for if Lands be devised in Tail the Remainder over, the Devisee dieth without Issue, the Remainder shall take place, and there is the same reason here.

Chancellor. In case of a Devise I cannot help where the Law fixeth the Estate, but if you come to have relief in Equity and there falleth out an unseen accident, which if the Testator had foreseen, he would have altered his Will, I shall consider of it; here he meant in case he left a Daughter born after his death she should have been provided for; and though it happens that his Wife had no such Daughter (viz. whereof his Wife was enseint at the time when he made his Will, and to which Daughter only the words of the Will extend) yet here is the same in effect. A. having only a Daughter devised his Trustees should convey the Land to the Daughter in Fee, the Testator recovered and after had a Son, the Daughter shall not carry the Land from the Son. And now the Lord Chancellor directed a Bill to be brought whereto the Posthuma Daughter should be a Party, and both Causes to be heard together.

Anonymus.

Anonymus. *The same Day.*

Where the Agreement for a Marriage, which shortly, ^{Unreasonable} viz. within seven weeks was had, but in the in- Agreement not ^{decree.} term the young Man had made address to another, but the Agreement was reduced into writing and not sealed, and was extream, that the Daughter and her Husband would have more than the Father (indebted) and the Mother, and two other Daughters unpreferted would have left.

The Lord Chancellor did not decree the Agreement, but if the Plaintiffs could recover at Law he would leave them to that remedy: It was referred to the Parties to agree among themselves else to attend again.

Elton *contra* Waite and Harrison. 18 Febr. 1679.

The Lady Anderson Grantee of an Annuity for years, made her Executor, who married Harrison, he being indebted to Waite and others, agreed with Waite to assign the Annuity to him for Security, and the Grant of the Annuity was delivered to Plucknet, a Scrivener, to draw the Assignment, but before it was perfected the Executor died; the Plaintiff took Administration de bonis non, and sueth for the Arrears the Grantor and the other Defendants for the Deeds, and had a Decree accordingly, though it was objected, that the Husband had power to grant and alter the property; and this Agreement was in Equity, an Administration, and the Defendants had paid some of his Debts in confidence of performance of the Agreement.

^{Agreement of the Husband of the Executrix binds not. Executor.}

Lloyd *contra* Philips.

A Decree in the Marshes to account, and the Bill here to be relieved, because the Witness is out of the ^{Jurisdiction:} Jurisdiction; but upon Demurrer dismiss.

Note, Witnesses examined upon the account below.

*The Attorney General contra Combe. Friday
27 Febr. 1679.*

Charitable Uses.

J S. seized of Land in Fee by his last Will in writing devised 10 l. per annum for ever (so long as there shall be a weekly Sermon every Saturday in St. Albans, to be chosen by the greatest part of the best Inhabitants) out of all his Lands in D. he being also seized of Lands pur auter vie, as to the Party who should have the 10 l. 2dly, What Lands should be charged with it, and whether the Arrears should be paid because no Sermon hath been had on Saturdays for many years, was debated; and the like for a Lecture in Hamsteed, &c.

It was objected that these Bequests were not within the Statute of 43 Eliz. which makes appointments to Charitable Uses therein mentioned good, and appoints them to be executed by the Commissioners, and therefore are not good by the Common Law, if the Devise it self, whereby they are raised, be not good, and here the Devise is to no person, and part of the Land intended to be charged was but an Estate pur auter vie, not devisable, and is devised no longer than while a Sermon weekly, which hath not been there of long time.

Chancellor. So long as shall be is so long as may be. 'Tis true, a Lecture is not within the Statute of 43 Eliz. but the Statute of 43 Eliz. took patern from 1 E. 6. made to take away Superstition, and doth make use of the same expressions, when it is to advance true Religion and Charity, viz. Given, Limited, Appointed, &c. Summa est ratio quæ pro Religione facit. In this Case there was Charity, but it is Charity mistaken, to be chosen by the greatest part of the best Inhabitants which is a wild direction, &c. He cited the Case where a Gift was to maintain a Superstitious Institution so long as the Law would allow, turned, when the Law did abrogate, that Superstition to a good use, and decreed that the 10 l. per annum should be to maintain a Catechist there to be approved by the Bishop; and the Arrears from the time of the Restoration of the King to be imployed in purchase of Lands to better the Maintenance, and the Lands pur auter vie to come in proportion with the rest; Vide the Order for the
the

the Annuities to maintain Lectures are thereby also decreed.

1. One Charity devised another devised.
2. A void Devise to Charity not within 43 Eliz. decreed.
3. Lands pur autre vie devised to Charity decreed tho' the Charity not within 43 Eliz.

Perne contra Oldfield.

CHapman seised of the Rectory of Crowland in Com. Curate not re-
Linc. 11 Jac. conveyed the same to the use of such movable.
persons as should be lawfully appointed to serve the Cure Pollea.
of Crowland for ever.

The Church is impropriate ab antiquo, and no Vicar instituted.

The Statute of 18 Car. 2. enables Gifts, &c. to Curats; the Vest of the Donor names Perne for Curate; Oldfield is named afterwards and instituted, but it was pendente Lite, but now said that there being several Owners, &c. Oldfield was put in by another and the Plaintiff is revoked.

Chancellor. By the Ecclesiastical Law no Man ought to be ordained sine titulo, that there might not be mendicant Preachers; and I distinguish between Curats where the Church is become Lay by Impropriation, and where not; for the Curate once put in and having a certain Maintenance he shall not be Dative and removeable at pleasure, for that were to lay a foundation of Simony for ever.

Quære. If this reason go not to Bonds made to resign, &c.

Anonymus. 1679.

ASells to B. with Covenants only against A. and all claiming by, from or under him. B. secured the Purchase Money, but before payment the Land was evicted, but not by any Title under A. but by a Title paramount. B. sued to be relieved that he might not be forced to pay seeing the Land was lost, and was relieved by the Lord Chancellor ex relatione Churchil.

Money stopt because Land evicted from the Purchaser.
Covenant.
Eviction.

Note. 1st. If Declaration at the time of the Purchase treated on, that there was an Agreement to extend against all Incumbrances not only special, it could not have been admitted.

2dly. The affirmative Covenant is negative to what is not affirmed, and all one as if expressly declared, that the Vendor was not to warrant but against himself, and the Vendee to pay because Security absolute without Condition.

3dly. Quære, if this may not be made use of to a general inconvenience, if the Vendee, having all the Writings and Purchase, is weary of the Bargain, or on other respects sets up a Title to a Stranger by Collusion.

Nota. In many Cases it may easily be done, &c.

Blackston *contra* Moreland. 1 March, 1679.

Mortgage.

Porter had an Annuity charged on the Manor of, &c. Moreland had an Estate in the Manor liable to the Annuity; Blackston had an Estate subsequent to both by way of Mortgage; Moreland having no notice of Blackston's Interest treateth with him in the Reversion in Fee, who desired to borrow Money of him, and thereupon he agrees and purchaseth Porter's Interest, and for that and Money lent to the Reversioner, buys in Porters Interest, and pays 900 l. part to Porter, part lent to the Reversioner, there being no more than 500 l. due to Porter.

The Question was, whether between Moreland and Blackston (who now exhibits his Bill to pay off Porter and Moreland their Debts) he should pay more than was due to Porter, more than 500 l. and the Mortgage Money due to Moreland. He is decreed to pay the whole 900 l. but otherwise if Moreland had notice of Blackston's Incumbrance.

Grosvenor

Grosvenor Plaintiff, and Cartwright, Admini-
stratrix of Thomas Cartwright, Defendant.
3 March 1679.

Resolved and Decreed by the Lord Chancellor.

AN Executrix or Administratrix receives in Money, Interest.
which was secured to the Testator, if she lend it Executrix calls
out to Profit, she shall not account for the Profit, for she in and receives
lends the Principal at her hazard, so that if it miscarry a Debt well se-
she shall make it good to the Estate. cured, she shall
not pay Interest,
though she lends
it out on Profit.

A difference was endeavoured to be put on this Rule,
viz. That where the Debt was paid in by the Creditor
without her Compulsion, there she should not answer Pro-
fit made by lending it out again; but where the Money
was lent by the Testator on good Security, and such Se-
curity continued good, and the Executrix calls in the
Money and lends it out again, that there she should answer
the Profit she made; for it was her voluntary act, and is
in effect to deprive the Children of the benefit of the Money,
till the Infants come of age, and turn it to her self, which
being for a great Sum, as in this Case it was for many
thousand pounds, will be great gain to the Executrix, and
loss to the Children for whom in effect she is trusted; this
was earnestly pressed: But

The Lord Chancellor. It is a fixed Rule of the Court
and I will not change it; but she shall forthwith discover
what Monies she hath, or hath received of the Estate on
such Security or otherwise, and for the time past she is
not to be charged, but shall hereafter lend none of the
Money without leave of the Court; and such Monies as
she hath lent she shall discover the Securities to them, and
if they like them, and so declare their acceptance, you shall
have the future Profits of the Money lent, else not.

If the Plaintiff reply to an answer and without rejoyn-
ing and giving Rules for publication bring the Cause to an
hearing the Answer shall be taken wholly true as if there
had been no Replication, for the opportunity which the De-
fendant hath to prove his Answer is taken from him.

The course of
the Court.

Simpson and Field. 3 Martii, 1679.

The Case.

A Surety not
bound by Law
shall not be
bound in Equi-
ty.

J. S. was indebted to J. D. by Bond of 1000 l. to perform an Award; by the Award was due 250 l. to the Obligee. J. D. put the Bond in Suit against J. S. A Bill is exhibited here to be relieved against the Suit, and an Injunction awarded on Recognizances to abide the Order on Hearing. Field and the Obligee are bound in the Recognizance, which was penned to pay what should be reported due by N. H. a Master named in the Defeazance or Condition; but the Master died before any Report made, and so also did the Obligor, who died intestate worth nothing: By the strict penning of the Defeazance the Recognizance is not suable at Law, because no Report was made by the Master. The Obligee, because he could not proceed in the Cause without reviving the Suit, which was abated by the death of the Obligor, who was one of the Plaintiffs in the Bill, procured Administration of the Obligor to be taken in the name of a poor fellow, and in his name revived the Cause, and brought the Cause to an Hearing, and a Reference to a Master to take account of the just Debt, who reported 300 l. due.

The Question was, if the Sureties should be charged: It was objected that this is a manifest Fraud and Practice of the Obligee to bring a Charge on the Surety, who was not bound by Law; and the Practice is plain, for the Reviver is by the Administrator, which no Man would do to charge himself; but this was answered and every day done when a Cause cannot proceed for want of Parties, viz. Administrator, &c. to take Administration, &c.

But the great Question was, if the Surety, who was not liable in Law, should be made liable in Equity, for the Plaintiff had good remedy for a just Debt, and justly proceeded to recover it; but the Court staid his Suit, and takes ill Security, which proves so, and the Debt lost thereby, and therefore the Court is bound to do us right; and the intent of the Court was, that the Debt, if due, should be secured; and the intent was not with reference to this or that Master's Report, for suppose that the Court had during the Life of the Parties transferred the

References

References to another Master, and he had made a Report, that should have bound ; and in case of a Bond lost this Court have made a Surety to pay it. Yet the Lord Chancellor contra ; for the Party is but a Surety not bound by Law.

Bromley *contra* Hamond. 4 March, 1679.

THE Father and Mother Tenants for Life, the Remainder to the Son in Tail by Marriage Settlement on great consideration, the Father and Mother mortgage the Lands to J. S. in Trust for one Marshal a Scrivener ; the Father, as was alledged, made Oath before the Mortgage that he was seized in Fee ; the Father died, Marshal doubting or finding his Security bad, gave 20 to one to procure the Son to borrow 100 l. of him, but did not at all discover that the 100 l. was his ; the Son did borrow the 100 l. and mortgages his Lands for it, and this was conveyed to J. S. who had the Father's Mortgage, and the 100 l. not being paid a Bill is exhibited to foreclose the Son of Redemption, which was decreed ; then D^r. Mills purchaseth by way also of Mortgage ; the Son after the day appointed by the Order to pay the 100 l. tenders it with damages, but was refused. The Decree was intolled, but that was done with such speed that the advantage thereof was waived.

Mortgagee lends more Money on a second Mortgage, the first being bad.

And now the Matter insisted on was, that the first Mortgagee having a defective Assurance, now having gained a good Title in Law to the Lands, and the Plaintiff having no Title at Law ought to redeem both Mortgages, and pay the Money of both Mortgages or not to redeem it at all : As in Sir John Fagg's Case, who having purchased on a defective Title for a small Sum, obtained into his hands the Deed of Intail against him.

Chancellor. The Son is a Stranger to the Father, and all one as a Stranger, and differs from Fagg's Case, and decreed a Redemption on payment of the 100 l. Damages and Costs. The Mortgagee did oppose the Redemption by his Answer ; but as to the practice in gaining the second Mortgage it is not material, for he did nothing but to secure a just Debt.

Costs.

Axtel *contra* Axtel. 4 March, 1679.

The Case.

Election.
Devise.
Eviction.

THE Husband devised three Tenements, and one called Cox's Tenement, to his Wife in satisfaction of her Dowry, with Election to her to take one of the other, the Dowry or the Legacy; afterwards he sold Cox's Tenement and died without new publishing the Will. The Wife insists to have satisfaction for Cox's Tenement, because her Husband gave her that with the rest as in satisfaction of her Dowry to which she is intitled. And the Plaintiff cannot bar her of her Dowry by the Will; but the Lands devised are but Church Leases. And (said her Counsel) she asketh nothing of the Court, but that she may have only what the Law giveth her.

Chancellor. She must take the Will as it was at the time of the death of her Husband, for till then 'tis no Will; let her choole one of the other, she may not have both; and decreed accordingly.

D E

Termino Paschæ

Anno Regis 32 Car. II.

In

CANCELLARIA.

----- contra Wilkinson. 1 May 1680.

JS. seized of Lands and Houses in Fee, by his Will in writing deviseth to A. Lands of 100 l. per Annum in Fee, to be set out by his Executor, and 5000 l. to one Kinsman, and 3000 l. to another, and dyeth: The Executor sets out to A. Lands for 100 l. per Annum, which were worth more, and thereby the Lands and Houses left are not sufficient to pay the 5000 l. and so forth. The Legatees exhibit their Bill to avoid the setting out of the Lands.

Account of Legacies.
Legacies in Proportion.

The Defence made against it was; 1st. That the Devise of the Lands was a Specifick Legacy, and consequently not to come in average with the other Legacies.

But the Lord Chancellor decreed, That it was not a Specifick Legacy, but quantitatæ, and therefore if there were not sufficient, each should bear his share in the loss. But then it was objected, That it was not practicable in this Case, because that A. had for valuable Consideration alienated some part of the Lands.

The Lord Chancellor decreed, That Sir J.C. a Master of the Court, examine the value of the Lands and Houses what they were worth to be sold at the Testator's death; and if A. had more than his Proportion of the whole value, to pay for it.

E

Ebrand

Ebrand *contra* Dancer. 7 May 1680.

THE Grandfather takes Bonds in the name of his Children being Infants, the Father being dead. Chancellor. There is difference in the Case, where the Father is dead and where he is alive; for when the Father is dead the Grand-children are in the immediate care of the Grandfather, and if he take Bonds in their names, or make Leases to them, it shall not be judged Trusts, but Provision for the Grand-child, unless it be otherwise declared at the same time; and decreed accordingly on that Reason, though there were other matters.

Admiralty.
Merchant.

Nota, Eodem die 7 Maii, ex relatione Mr. Finch Solicitor. A Ship broke the Ship of H. who sued in the Admiralty the Ship for recompence: J. D. became Bail for the Ship in the Court of Admiralty; whereupon the Ship being discharged, was sold to the Defendant: the Surety in Proceeding was condemned in the Admiralty; he sueth here to be relieved and dismiss: Ex relatione Mr. Finch Solicitor General.

Thomas, &c. *contra* Lane Widow.

Jeffery Thomas had four Children; John his eldest Son, Father of the Plaintiff; Grace, married to Lane deceased, Elizabeth and William: And by his Will devised his part of a House in Exon to Grace and other Houses; one to Elizabeth, another to William, with this Clause, That if any other of his said Children died, his part should go to the Survivors: He died: John, Grace and her Husband, and William, came to an Agreement with John, which was executed by writing and possession accordingly, near twenty years: John devised the Lands to raise Portions for two of the Sisters; his Daughters were paid their Portions; the Plaintiff is the third, and sueth to have the Agreement stand; for Lane the Widow sued at Law, and recovered part of the Lands, which by the death of John accrued to her, Elizabeth and William. The Decree concerned Lane only, because of her Coverture at the time of the Agreement. The Case as to her, that by the Agreement, whereas the House,

House, viz. a part of it was devised to her only for life, John was to convey it and a Garden, and Curtilage adjoining to her for her life, Remainder to her Daughter Rebecca for her life by Deed; and a Covenant in the same Deed to estate the Husband of Rebecca or her first Child therein also after her and Rebecca; and though the Agreement and Execution thereof could not bind her, yet she after her Husband's death having entered into the House, and also the Garden and Curtilage, (which was not devised to her, for though a Messuage devised will carry a Garden and Curtilage, yet the Devise of a House will not, especially being devised without the words cum pertin' or the like) hath now since she became Sole, consented to, and taken the benefit of the Agreement made during her Coverture.

The Defendant answered, That the Addition of the Estate to her Daughter, &c. and his entry into the House and Enjoyment of it, could not bind her nor conclude her consent to the Agreement, for she had title to it by the Will, for it is the same which was given by the Will, and no more; for the Garden is but a small piece of Ground, but a Poll, and no Passage to it but through the House, (as the Counsel said.)

The Lord Chancellor dismissed the Bill, but ordered that no benefit be taken of the Agreement, or Deed made thereon by Grace or Rebecca, (who was one of the Defendants) because Grace is not to be bound being Covert, and cited the Case 7 E. 4. the Wife received Honey during the Coverture.

Sidney contra Earl of Leicester.

Leicester-house on the Marriage of the now Earl of Leicester, then Lord Lisle, with the Daughter of the Earl of Salisbury, was settled on Robert late Earl of Leicester for his life, Remainder to the now Earl for his life, Remainder to the first, second, &c. Sons of the now Earl in tail, &c. The Marriage took effect; the now Lord Lisle, first Son, is born: Earl Robert makes several Contracts with divers Workmen to build on Leicester-fields near the House, and in part settled before, and Leases for 42 years (whereof now 14 are expired) were made accordingly; but after the Buildings were begun and proceeded in,

Consent verbal
obliging.

the Builders begun to leave off, because they had notice of the Settlement. Earl Robert thereon writes to his Son the now Earl, for his consent that the Buildings might proceed, and that he would consent; for the Ground before the Building was but 4 l. per Annum, and the Rent at present during the Leases is raised to 53 l. per Annum, and by Improvement after the Leases, will be 2000 l. per Annum. The consent of the now Earl was proved, and he is decreed to confirm the Leases, though the consent was but verbal, and said it was for the benefit of the Family.

But whether the Lord Lisle, who was in Remainder in tail, should be decreed to confirm, the Lord Chancellor would advise.

He acted and did negotiate between his Father and Grandfather to procure his Father's consent not only during his Monage, but also after his full age.

Hele contra Hele. 1680.

Agreement for
Jointure.

The Plaintiff, Widow to H. Hele, sued for her Jointure; the Bill was founded on an Agreement, whereby for 3000 l. paid in Money, viz. 2300 l. and 700 l. by Assignment of Bonds, H. Hele covenanted to settle 300 l. per Annum in Lands for her Jointure, and 40 l. per Annum Rent was granted to her before Marriage to bar her of Dower; but this was only in proof, not in the Bill.

The Defendant by answer sets forth, The Will of Samuel Hele, elder Brother of Henry, whereby he devises his Lands to Henry for life, Remainder to first, second, &c. Sons of Henry in tail successively, the Remainder to Richard a Cousen, in like manner, with Remainder to others in like manner; but in the Will a Power was given to Henry to limit the Capital Messuage and Lands which are called Fleet, to any Wife; but he executed not this power, and whether that Henry dying before any Execution accordingly, the Court should decree it, it being a new Case, the Cause was put off till another day.

Mecker

Meeker *contra* Tanton. 10 May 1680.

The Bill was against the Heir of the Mortgagor to have payment, or whole without Redemption; and because the Administrator of the Mortgagor was not made Party, the Cause being opened at hearing, the Plaintiff could not be admitted to proceed, for in all Mortgages the Money must go to the Executor or Administrator, and not to the Heir.

Elliott *and* Hele *contra* Hele. 11 May 1680.

Elliott, Father of Hele, the other Plaintiff, set forth, That Sir Henry Hele seised in Fee of divers Manors, &c. in Com. Devon, Cornwall and Somerset, in consideration of a Marriage with the Plaintiff Hele, and 3000 l. did agree to settle Lands of 300 l. per Annum on the Plaintiff for her Jointure, and the 3000 l. paid and secured, and prays performance.

The Defendant sets forth, That he knew not the Agreement, but said he claimed not under Sir H. Hele, but by the Will of Samuel Hele, elder Brother of Sir Henry; who by his Will devised the Lands in such manner as thereby appeareth, not shewing how, but that the Plaintiff could have no Jointure, saving that some Lands did descend to him in Fee.

The Cause coming to be heard, was thus, viz. Samuel Hele elder Brother of Sir Henry, seised in Fee of divers Manors, & inter alia, of Fleet Damarel, Capel Messé, &c. devised all (except some parcels) to Thomas Carew and others in Fee, on trust to raise 10000 l. Portions for his Daughters and pay his Debts; and this by Sale of all or any part, and by Leasing as they should think fit, and after for Sir Henry his Brother for life, the Remainder to his first, second, and third Sons successively, and the Heirs Males of their Bodies, and to the Defendant Richard Cousin for life, the Remainder to his Sons and their Heirs Males, &c. Item, I appoint, devise, and give to Henry power to limit and appoint Fleet Damarel, &c. to my Wife after the death of Amy, (who revera had a former Jointure therein, and died before the Plaintiffs Marriage, but nothing was said of that

that at the hearing) Sir Henry after the death of Samuel agreed prout, but died within Three quarters of a year.

The first Question was, If the Plaintiff could be relieved out of the power, for else there was not sufficient for 300 l. per Annum?

Power.

The Lord Chancellor inclined strongly for the Plaintiff, in regard of the Consideration, and because Henry had power by the Will to have done it, and was express, that if he had de facto done it, and mist in time or other Circumstances to have done it well, the defect should have been supplied, for Circumstances in such Case are only put into such Powers, to the end that no Fraud or Falshold should be imposed, and cited the Countess of Oxford's Case, so decreed by the Lord Elfinere, and another Case; and said that the Stat. de Donis was an ambiguous Act; and at the Bar it was observed that the Will gave no Estate to Henry, nor Estate tail to his Sons, but the Estate was in the Trustees, and a Trust for Henry, which is under the power of this Court, and Trusts in tail are not favoured in this Court. And it was also said, that the Non-performance by Henry ought to be excused, and not imputed to the Plaintiff's Prejudice; for the death of Henry hapning so soon after the Marriage, that Accident being the Act of God, prevented him, and Accidents are a proper Object of Relief.

Equity but no Bill.

But after some debate Churchill for the Defendant moved, that if the Plaintiff have Right, yet she hath no Bill for it on this Case, for she hath set forth a Seisin in Fee, and not the Power; and of that Opinion the Lord Chancellor was. And thereupon the Plaintiff's Council prayed, that they might amend the Bill, which was granted, paying the Costs of the day.

D E

Term. Sanct. Trin.

Anno Regis 32 Car. II.

In

CANCELLARIA.

Perne *contra* Oldfield.

THE Church of Crowland in the County of Lin-
coln, being appropriate to the Abby of Crowland, Curate Ecclesia-
tical.
and no Vicar endowed, (for ought appears it
seems that the Cure was served by some of the
Monks :) The Rectory came to the Crown; and by mean
Conveyances to one Mr. Chapman, who gave the Rectory
by his Will to the Maintenance of a Minister there for
ever, reserving not the Nomination of a Minister there,
nor expressing any thing concerning such Nomination, the
Devile of the Rectory being void at Common Law, being
made to no certain Person. The Estate thereof came to
Sir Thomas Orsby and Wingfield, who did appoint and
nominate the Defendant Oldfield to be Minister and serve
the Cure; afterwards the Plaintiff, supposing a Laps to
the Crown, was presented, instituted and inducted, as if the
Church had been void. Orsby and Wingfield Rectors, sup-
posing that the Nomination of the Minister belonged to
them, nominated Oldfield: Perne sued the Rectors for
Tithes off Fen lands impropd lately, and gained from the Tithes of Fen-
Water. They pretend a non decimando under the Abby: Land improved:
And that Perne the other Defendant was not Minister; so
he pretended that the Tithes belonged to him.

For

For the Plaintiff it was said, that here is a pious use wholly subject to this Court; and that Perne coming by the Ordinary, though he was not Parson or Vicar, was allowed by the Bishop, and decreed accordingly that he should have the Tithes; but as to the non decimando, a Trial, &c.

Williams *contra* Day. 18 June 1680.

Executrix.

The Plaintiff Rebecca complains, &c. The Case on the Bill was, That the Defendant, Executrix of her Husband, sued her as Executrix of Roger Win, with Robert Son of Roger, and Co-Executrix with her, for a Debt of 400 l. Principal, due by Bond: That Roger a Mercer dying, the Plaintiff was sick and unable to manage the Estate. Whereupon Robert entered into the Shop, paid Book debts, (for advantage of the Trade, which he continued, whereby the Estate was wasted as to Creditors by Bond;) and there being Leases for years of good value, and great Debts by Bond, the Plaintiff and Robert agreed that those Leases should be sold, and the Money paid to Robert, and he to pay the Money to Creditors by Bond. The Plaintiff joined with him in the Sale, and he received the Money, paid it to Creditors by Bond, and complains that in a Trial against her in debt brought on the Bond, whereto she pleaded plene Administravit, the payments of the Bond made by Robert in discharge of her, was not allowed by Sir William Scroggs, Chief Justice, unless that she would stand in Robert's place, and be chargeable as he was, and by consequence with the Devastavit committed by him, whereto she ought not to be liable. The Trial proceeded not to a Verdict, but a Juroz withdrawn, and now she prays relief.

Account binds
one not Party to
it.

Mortgage.

Waste.

Land is mortgaged to A. then to B. then to C. If A. sued to redeem, and try his Debt by Decree, C. A. and B. shall be bound by the Account which A. made in his Suit, and pay or contribute to the Charges of Suit; if made without fraud or Collusion. Vide ante.

The Lord Chancellor declared, that he would stop pulling down Houses, or defacing a Seat by Tenant after possibility of Issue extinct, or by Tenant for life, who was punishable of Waste by express Grant, or by Trust.

Jason

Jason contra Eyres, Domin', &c. 14 June 1680.

Sir John Hammer leased in Fee of the Manor of Great Hinton, &c. mortgages the same to Sir Tho. Skipwith for 7000 l. and forfeited it; the same was afterwards conveyed to Ann Fisher and her Heirs on Agreement, that if Sir John Hammer or his Heirs paid 4000 l. with Interest, the Lands should be reconveyed, otherwise to be absolute. Mortgage notwithstanding particular Agreement & contra

The Money was not paid, then Sir John Hammer and Ann Fisher agrees with Sir Robert Jason, Father of the Defendant Jason for the sale of the Premises for 11500 l. 7000 l. was paid, and the Lands conveyed to Sir Robert Jason the Father and his Heirs, the 4000 l. and Interest was still chargeable on the Land: Afterward there was a Treaty of Marriage to be had between Sir Robert Jason and the Complainant Dame Ann, and by Articles 1674. it was agreed, That 2100 l. should be paid to Mr. Fisher towards that Debt, 1500 l. whereof being the Portion of Dame Ann, was paid and 600 l. more by Sir Robert Jason, by which the Debt was reduced to 1900 l. Principal money, for securing whereof a Lease for 500 years was made of the Premises to Travers and Finch Defendants, &c. And is provided for payment of the said 1900 l. with Interest, viz. 57 l. on the 25th of December 1674. and the 25th of June 1675. other 57 l. and 1957 l. on the 25th of December 1675. And that afterwards the said Fisher should join with Sir Robert to convey the Premises to Carew and Holbech, and their Heirs, to the use of Sir Robert for life, the Remainder to Dame Ann for her Jointure, and in full of Dower. The Remainder to the Defendants, Carew and Holbech, and their Heirs in trust, that if Sir Robert the Father should pay the said 1900 l. with Interest as aforesaid, amounting to 2700 l. if he should so long live: Or otherwise, If he should within three years after the date of the last Conveyance, bearing date the 19th of June, 26 Car. II. if he should so long live, pay the said Debt on the said Lease, and procure the same to be surrendered; To the intent that if the Complainant Dame Ann survived him, she so long as she lived might hold the Premises discharged of the same; then the said Carew and Holbech should be seised of the Premises to the use of Sir Robert and his Heirs.

f .

But

But in case failure of Payment was made, or that Sir Robert, her intended Husband, should die before Payment and Surrender of the said Lease; in either of the said Cases the said John Carew and Holbech, and the Heirs of the said Survivor, should stand seised of the Reversion to them limited, in trust for the said Complainant and her Heirs, not only to enable her to pay the said Debt, and free her Jointure thereof; but to the end she might enjoy the Inheritance for increase of her Fortune, according to Agreement between her and the said Sir Robert; and that then they should convey the same as she, (during Coverture or Sole) or her Heirs should direct.

28 March 74.

Sir Robert Jason died; Jason the Defendant being his Heir, Ann his Relict after married Sir Christopher Eyres the Plaintiff; and there being a former Incumbrance not taken notice of to Mr. Hodges of 1000 l. Sir Christopher Eyres paid that 1000 l. with Damages.

On this Case cross Bills are exhibited by Sir Christopher and his Wife, to have the Inheritance; and by Jason to have the Inheritance, he paying the Debt.

1st. At the hearing on Eyres his part, it was pressed as the express Agreement, that the Wife should have the Inheritance, the Debt being not paid, nor Lease surrendered.

2dly. That it could not be a Mortgage as to Ann the Wife, though the Lease was a Mortgage to Fisher.

3dly. If it had been meant to have been a Mortgage, the power of Redemption would have been limited to the Heir as well as to Sir Robert the Father, which was only limited to the Father, and not to his Heir.

4thly. There was reason for so doing, because the whole Portion was expended in reducing the Debt, and so till payment of the Debt she would be without any Profits of her Jointure.

5thly. The Cause being foreseen, it was expressly agreed, that the Reversion in the Trustees settled should go to the Complainant and her Heirs, not only to enable her to pay the Debt and free her Jointure, but to the end she might enjoy the Inheritance for the increase of her Jointure.

1. But the Lord Chancellor decreed it a Mortgage, saying, That if the Father Sir Robert Jason had lived after three years, it could not be denied but he might have redeemed it.

2. That

2. That no Mortgage by any artificial words can be altered unless by subsequent Agreement.

3. That divers Proofs touching Parol Declarations were offered and read on both sides, of which the Court would take no notice, but rejected.

Anonymus. 8 July 1680.

The Case.

A. Took a Statute for payment of 200 l. lent, but finding a former Incumbrance for other 200 l. to B. did purchase B's Estate; then discovering another Mortgage made by Dicklemere to C. for 500 l. purchased in that also: But Dicklemere who made all these Incumbrances, did make another to the Plaintiff subsequent in time to the first Mortgage for 1. but proceeded to the two last, and this Mortgage. The Bill is, that he may pay off the 500 l. Mortgage so to be let in, &c. Pay all or none.

The Question was, whether he should be admitted without payment of all, viz. the two later? and decreed he should not unless the first 200 l. Man had notice, &c.

Eodem die Linch contra Cappy.

Cappy, Executor in trust for Linch in Remainder after the Testator's Children, or other nearer Kindred to the Testator than Linch was of the Residuum of the Testator's Estate, and after for Linch in case they died as they did. Linch now sues Cappy for an Account: The question was, whether Cappy, who did receive great Sums of Money of the Testator's Estate, and put out the Money again at Interest, and received Interest for the same, should answer the Interest so made and received by him? and on much debate it was decreed he should not. Lord North in his time declared e contra hic.

But then it was insisted on, and it was true, that Cappy had annexed to his Answer an Account of all his doings, wherein he brought to account the Interest as well as the Principal, and therefore had adjudged the Case against himself. The Council e contra answered, he could do no other; for the Bill requires his Answer to the whole Transactions. Interest.
Executor.

The Lord Chancellor. Did he offer to pay the Interest as well as confess the Receipt of it? No; and therefore pronounced for the Defendant as before: But some Proposition of an Expedient was then offered and accepted.

Anonymus. 13 July 1680.

Freight.

Refusal.

Merchant.

Admiralty.

A Part-Owner of a Ship sued the other Owners for his Share of the Freight of the Ship which had finished a Voyage; but the other Owners did set her out, and the Plaintiff would not join with the rest on setting her out, or in the Charge thereof; whereupon the other Owners complained thereupon in the Admiralty, and by Order there the other Owners gave Security that if the Ship perished in the Voyage, to make good to the Plaintiff his Share; and if she returned, to restore his Share, or to that effect: And in such case by the Law-Marine, and Course of the Admiralty, the Plaintiff was to have no Share of the Freight. It was referred to Sir Lionel Jenkins to certify the Course of the Admiralty, who certified accordingly; And that it was so in all places, and otherwise there could be no Navigation: Whereupon now the 13th of July the Plaintiff was dismissed.

Fashion *contra* Atwood. 19 July 1680.

Agreement.
Assignment.
Executor.

Pearson living in London, was Agent and Factor for Atwood now deceased, to sell Norwich-Stuffs in London, which Atwood sent him from Norwich: And in the management of this Trade, Atwood charged Pearson with Bills of Exchange; and it so fell out that Pearson had sold in Atwood's name divers Cloathes for Money payable at future days; and doubting he had not Goods in his hands to make good what he had undertaken by accepting Atwood's Bills, informs Atwood of it, and Atwood agrees that Pearson secure himself out of what Effects, &c. he had. At this time Atwood was indebted to Eborne, and others by Bond; and Pearson was likewise indebted to others on his own account: Pearson by word assigns to his Creditors the Debts which were due to Atwood; Atwood and Pearson both die: The Administrator of Pearson, and the Assignees of the Debts due to Atwood, but assigned

assigned by Pearson to his Creditors, sue the Executrix of Atwood for to have the benefit of the Debts due to Atwood for his Goods sold by Pearson, but assigned by Pearson to his own Creditors.

The Question was, whether the Assignee of the Debts by Parol made by Pearson, and the Parol Agreement of Atwood, that the Goods and Debts which Pearson had and contracted for, should be his Security for his undertaking for Atwood, should prevail against the Creditors of Atwood, especially such Creditors of Atwood as had Bonds; for the Persons who had bought Atwood's Goods of Pearson did know that the Goods were Atwood's, and not Pearson's, and entered in Pearson's Books as Debts due to Atwood not to Pearson; and thereupon we of Council with the Executor of Atwood, and the Creditors of Atwood by Bond insisted:

1st. That the Goods were sold as Atwood's Goods, and the Buyers entered in Pearson's Books as a Debt to Atwood, Pearson had no remedy on the Contract; but Atwood was solely Owner of the Debt.

2dly. That the Debt being a thing in Action, is not transferable by Law; so as notwithstanding the Agreement of Atwood, he still in Law remained Creditor; and this is a Case between Actors and Transactors in England, not of Merchants, who by Law-Merchant may assign Debts.

3dly. That though in Equity Pearson might retain, or be intitled in Equity to the Debt against Atwood himself; yet now the Case is changed by the death of Atwood, for now the Creditors of Atwood by Bond are in a better case than Pearson, who had no title but by Parol; and if Pearson would sue the Executrix of Atwood, she could not pay him; but if she did she should commit a Devastavit, and break her Oath as Executrix; and the Assignees of Pearson could be in no better case than Pearson, and his Creditors were.

4thly. The Creditors of Atwood by Bond had a good title in Law to be satisfied out of his Estate and Debts, and they had done nothing to prejudice their Title: And the Case is not the same, for the Goods remaining unsold as for Debts.

The

The Lord Chancellor. By the Agreement Pearson had a good Title in Equity to the Debts, which in Equity are become his, and are no longer Atwood's; and therefore decreed for the Creditors of Pearson.

Hethinks there was another Equity for Pearson, but was not mentioned or insisted on, viz. That in case of Merchant and Factor, the Merchant should not have account from the Factor, but if the Factor were out more than could be demanded from his Factor, (as in this Case it happened) the Merchant should first make even.

Anonymus. 20 July 1680.

Joint-Traders.

TWO Drapers entered into Articles of Copartnership, each brought in a 1000 l. Stock, there was no benefit of Survivorship, neither to become indebted without the other, neither to take out of the Stock without the other: One became indebted 100 l. without consent of his Partner, made his Wife Executrix and died; his Wife confessed Judgment for the Debt, the other sues for Account and Relief against the Creditor and the Wife; they confess the Articles, and obtaining the Judgment.

And 20 July 1680. on debate, The Lord Chancellor granted an Injunction against the Judgment, because the Debt related not to the Partnership, saying if this shall be suffered no Trade could be in such Case. Mr. Solicitor cited Atwood's Case, prox' ante 36.

Eodem die.

Solicitor received the Plaintiffs Money without his knowledge.

The Plaintiff having a Decree for Money, the Plaintiff's Solicitor without order from the Plaintiff received the Money; the Plaintiff knowing nothing of it prosecuted again. On Complaint the Solicitor was ordered to pay back the Money, with Interest, Costs and Charges.

But as to the Plaintiff, the Lord Chancellor allowed the payment good, and bid the Plaintiff if he would, take his remedy against his Solicitor.

Anonymus.

Anonymus. 12 January 1680.

THE Wife Executrix to her Husband, married a second Husband. A Bill is exhibited against them to discover the Trust; the Husband and Wife disagreed in the matter, and put in severally their Answers; the Husband denied the Trust, but the Wife confessed it. The Cause proceeded to hearing, and the Plaintiff proved the trust only by one Witness, which the Plaintiff insisted on with the Wife's Confession, to be sufficient; the matter being but in that wherein she was concerned as Executrix. But the Bill was dismissed, quia the Wife's Answer shall not bind the Husband, ex relatione Sir J. Churchill and Serjeant Rawlinson.

The Wife's Answer not prejudice the husband.
Testis singularis.

D E

Term. Sanct. Hill.

Anno Regis 32 & 33 Car. II.

In

CANCELLARIA.

Balch *contra* Tucker. 24 January 1680.

Trial directed
on a Point not
in Issue.

AN Agreement was made under Hand and Seal, that Balch was to pay A. S. her Debts being 300 l. and she was to dispose by her Will any Sum of Money not exceeding 200 l. and A. S. being seised of an Estate for Lives, to her and her Heirs, of the Rectory of Huish; it was agreed, That if she had a Child, the Child should have the Rectory after her death, but if the Child died, the Plaintiff Balch was to have the Estate. This Agreement was made in order to a Marriage between the Plaintiff and A. S. The Marriage took effect, the Child died, A. S. made her Will, and thereby gave 150 l. in Money Legacy, and died. The Defendant her Heir, brought an Ejectment for the Rectory, and recovered it by Verdict as he must do, there being no Estate yet passed. Balch exhibits his Bill, sets forth the Agreement, and prays Execution, paying the Legacy and the Debts. The Defendant by Answer, positively denies the Agreement: The Cause went to proof and hearing; the Plaintiff proves the Agreement fully; the Defendant examined one Witness to prove that the Morning before the Marriage A. S. was troubled, and wept, and declared to him that the reason of it was that she would not marry unless a Writing which she had made to her Husband might be

be delivered to her again. Whereupon a Writing was delivered to him, and he delivered it to A. S. the Husband saying she should have any thing so she would marry him. The Marriage proceeded, the Cause coming to be heard, the Court ordered a Trial upon this Point only, viz. Whether the Agreement were waved? A Trial was had, and found for the Defendant that the Agreement was waved. The Plaintiff moved for a new Trial, and was denied, and an Order to dismiss the Bill; and now the Plaintiff moved again for a new Trial, or that the Cause may be re heard. J. offered it to the Court, that the Direction for a Trial at first was hard upon us.

The Question only upon Bill and Answer was Agreement, or not: Nothing in Issue, whether the Agreement was discharged, for that was quite contrary to the Issue; and if the Witness swore never so false, he is not perjured, and it is impossible for the Plaintiff to disprove the Allegation of a Defendant, which the Defendant never alledged; and it seems a piece of Artifice to make that a Defence of which the Court can never give Judgment, (when a thing is not alledged:) The Court must judge *Secundum Allegata & probata*; but by this way the force of an Evidence proper for the Court, shall be judged by the Jury, and not by the Court; for in this particular Case, if the Deed it self had been delivered up, yet it's no Discharge in Law except it had been cancelled: If it be granted that the very Deed was that which she desired, which yet he did not prove, for he, viz. the Witness swears he cannot write nor read, nor tell what it was that was delivered; yet it can amount to no more than that she desired to have it in her power to destroy it, which she never did; for it's proved the Husband had it after her death: And if the Defendant be too hard for us in the form of Proceeding, coming so late, we have more of the Strength of the Cause on our part in point of Substance.

The Court said we came too late, and would do nothing in the motion.

Note, The Court directed this Trial not upon a Deed shown, but upon Matter of Fact.

Juxon *contra* Morris. 8 February 1680.

Surrogate Deputy within the Stat. E. 6.

AN Officer within the Statute of 5 Edw. 6. (as I take it a Surrogate) makes a Deputation of his Office, rendering thereout 90 l. per Annum, and exhibits a Bill to have an Account.

The Defendant pleads, that the Deputation is void by the Statute, and ought to have no Account, it being in effect a Farm within the Statute.

Vide *Lockner & Strode*, Ante

Curia. After long debate the Plea was allowed.

Comes Banbury *contra* Briscoe. *Eodem die*.

Deed brought into Court for use of each Party.

GREAT Settlement was made of the Estate of the Earl of Dorset, consisting of divers Manors. Parcel of the Land on good Consideration was settled, under which Briscoe claims, being a Security for 6000 l. and the Deed of the grand Settlement delivered to Briscoe, or those under whom he claims: the rest of the Manors, &c. came to the Plaintiff, who exhibited his Bill to have the Deed of Settlement, offering in his Bill that Briscoe shall have a Copy attested by the Court.

Briscoe pleads his Settlement, and that he cannot make any Title without the grand Settlement, and therefore keeps it; but offers to the Plaintiff, that he may have a Copy of it attested, and that he will produce the Deed on all occasions at the Plaintiff's Cost.

Upon hearing the Plea the Lord Chancellor said, If Tenant for life have a Deed, whereby the Reversion and Inheritance is in another, he may at Law detain the Deed against the Reversioner; and ordered, that the Settlement shall be brought into Court for its safest Custody, and both Parties have the use of it as they have occasion: And both Parties if they please shall have Copies attested.

Knight

Knight *contra* Cooke. *Eodem die.*

JS. seised of the Reversion after an Estate for life, of ^{Mistake in a} divers Copyhold Lands, and two Acres of Freehold ^{Conveyance.} Lands, which Freehold Lands were in the possession of Ralph Copyhold. and the rest in A. B. C.

J. S. Assigns to J. D. and surrenders the Copyhold, and J. D. assigns the two Acres of Freehold to the Plaintiff, and inter alia, the Copyhold in the tenure of James. These Assignments were on valuable Consideration; the Bill charges that this was a Mistake, James being named for Ralph; and that the true Intention of the Parties that made the Assignments was, that the Copyhold in Ralph's Tenure was to be assigned, and that James had no Copyhold there, and therefore must needs be intended that Ralph had; because James had none, James and Ralph having both the same Surnames.

It was alledged, that the Assignment and Possession had been 20 years; but after it appeared that it was but 4 years since the Tenant for life died.

The Lord Chancellor inclined at first against the Plaintiff, but at last declared that the Copyhold could not pass but by Surrender only, and not by Conveyance.

Colston *contra* Gardner. *Eodem die.*

The Case was.

THE Plaintiff exhibited a Bill for an Account of a Personal Estate, and an Account was decreed, and referred to a Master to take the Account: Exceptions were taken to the Account, and referred back on one Exception. In the interim the Defendant having had a Treaty for the Marriage of his Son, but nothing concluded; He did by Deed in consideration to enable his Son to make a Jointure in case he married, and in consideration that his Son had undertaken to pay his Debts, amounting to 1700 l. settle all his Lands upon his Son and his Heirs, the Lands being of far greater value, viz. many 1000 l. and the Creditors were no Parties to the Deed, and in the Deed a power of Revocation reserved to the Father in

Account of a personal Estate decreed and referred to a Master.

Sequestration.

case the Son should die without Issue. This was done before the Master made his second Report: And the second Report varied but 11 l. from the former, being about 400 l. due upon both Reports: Process of the Court was pursued to a Sequestration against the Father and his Assigns, the Son being taken up on Attachment for disobeying the Sequestration; but being examined, excused himself by the Title aforesaid.

The Question was, whether the Son was liable to the Sequestration in this Case? Which was much debated by Council on the Son's behalf.

1st. Because there was no Land demanded by the Bill only an Account of a Personal Estate.

2dly. Because at the time of the Alienation the Account was not ascertained or adjudged, and the Case of an Outlawry was just; the Party aliening after the Outlawry, his Land was not subject to it in the hands of the Alienee. And

3dly. The Sequestration was for the Contempt, not for the Duty.

The Lord Chancellor took time to advise on the Case, and now, 8 February 1680. delivered his Judgment, and said, He would explain himself for Learning and Use.

He observed that the Judges at the Common Law were severe, and unwilling to support or assist the Proceedings of Chancery: And therefore he would cite some Cases and Proceedings against the Proceedings in Chancery first, and then apply them to the Case in question.

Object. 1. That this Deed or Settlement was made between Father and Son only, and the Friends of the Son's Wife, nor Wife, no Party to it: And all the Estate the Father had in the World was conveyed to, and settled upon the Son in consideration of this Marriage to be, and 1700 l. to pay his Debts.

2. That a Sequestration does not bind till laid upon it, or at least not till ordered.

At Common Law a Man may convey away his Estate before Outlawry.

And

And then the Lord Chancellor cited these Cases at the Common Law, as follow :

41 Jac. Cro. fol. 651. Brotlige contra Sequestration.

5 Car. I. Heber's Case. Crover gift.

20 Jac. Elwes. Indictment for Murder for a laying on a Sequestration, one being killed : Question if justifiable or not, Pardon sued out.

These Resolutions were so bloody and desperate, that it was to maintain them where Conscience and common Honesty was concerned to preserve People and their Estates from Tricks and Cheats, and no remedy for any Person in these Cases following, if those Resolutions were maintainable, but since have been changed.

3 Car. I. Rolls Abridgment, 376. Bond lost not recoverable.

22 Edw. 4. fol. 6. A Release obtained from Trustee, no Relief, for Cestui que trust.

13 Jac. Finn and Powell.

11 Edw. 4. Resolved that Money on a Bond, and the Bond lost, and after sued for, yet no remedy, but the Money must be paid again.

13 Jac. Powell contra Harris ; Null Account contra Executor.

Eodem anno. Glasscock Entry lawful for Condition broken, not to be relieved.

14 Jac. Bromadge contra Election to pay Damages for Executing a Bargain in Specie.

Trin. 17 Car. Either cited in the C. B. or in the Star-Chamber, moved by Serjeant Bacon for a Prohibition fur Sequestration : The Judges found on debate, that the Land was not within the Sequestration, for which the Prohibition was prayed ; but if the Lands for which the Prohibition was prayed, had been subject and within that Sequestration, it was granted the Sequestration had been lawful.

Court-Baron, A Levari fac' may be renewed from time to time ; and in Chancery, may be in like manner as at Common Law.

And

And may Sequester Land and Copyhold too, and may be extended to a Personalty, for a Sequestration to be laid on and administered by Court of Equity, never to be laid on but conscionably.

Sequestration to come bona fide, without consideration, yet good.

Derby Com. contra Com. Ancram. Sequestration goes not till Suit revived against the Heir, unless the Father's Conveyance be pleaded.

Witham and Bland. A voluntary Conveyance to the Heir to avoid an approaching Sequestration against the Heir, good if bona fide done: But in this Case where Fraud appears, Authority and Reason against it.

Reason 1. Not to allow it in case of a just Duty decreed.

2. Makes this Court Illusory.

3. Permits Hankind to be Cozened.

And two are settled already; Witham and Bland's, which began in the time of my Lord Shaftsbury, and was where the Son claims against the Father, &c. which came to be heard the 4th of March 1672. And was in November following before his Lordship, the now Lord Chancellor, a Sequestration was ordered to issue.

The Son departed from his voluntary Conveyance, and set up a prior Conveyance, with power of Revocation; but the Deed being without a power of Limitation to limit new Uses, which his Lordship then and now declared, that although no power of new Limitation was expressed in the Deed, yet the Law gives the Revoker a power, for he that has power to revoke has power to limit.

17 May 29. Car. 2. Langley and Breydon. A Sequestration for Personal Duty, and then declared a voluntary Conveyance on purpose to bar Sequestration, void.

And here in this Case the Wife shall have that part of the Estate settled on her for Jointure.

Objected by Sir Fran. Winnington; Your Lordship declared a voluntary Conveyance would not bar a Sequestration, therefore permit us to try it.

Curia. No; I am of opinion there is Fraud apparent, and needs no Trial for Satisfaction.

Snelling

Snelling *contra* Squib. *Eodem die.*

SNelling had Judgment against Sidenham of 1200 l. for payment of 500 l. Squib purchased of Sidenham for valuable Consideration without notice : Snelling sues Squib to discover Lands subject, &c. that he might extend, not knowing the Place nor who Tenants. Squib pleaded his Purchase for valuable Consideration without notice.

The Lord Chancellor allowed the Plea, for such Purchase shall not be hurt in Chancery against the Plea ; and therefore Squib shall not be enforced to discover what Lands are liable.

Purchaser of Lands subject to Judgment not enforced to discover, otherwise if to Decree.

1. It was much debated, and objected, That a Judgment binds the Land who ever had it : And the Plaintiff's Bill is not to have a Decree for his Debt, or to have the Land, but to discover the same whereby at Law he may recover his Debt.

2. His Title is given him by Act of Parliament, by which the Land is subject, and was not at Common Law.

3. The Consequence of this Will makes all Statutes and Judgments, which are a Security by Law, to become of no effect, for the Conuzee must extend the whole, or a moiety of the whole : And if he omit any part, his Extent is avoidable, and by consequence, he that acknowledges a Statute or Judgment, and after aliens any part for valuable Consideration secretly, it will be in his power to avoid his own Securities.

4. There will be no difference between a Judgment obtained by Consent, and a Judgment in *Invitum*, or Process of Law ; in which case it will be very hard for any Person that any Man by his own Act should avoid the Justice of the Law whether he carry it secretly or openly, or to enable any other man to do it by secret or other means.

5. Where Men contract, the Purchaser may provide for himself by Covenant ; but he that recovers by Law, cannot provide for himself by Covenant ; so that the Case is more strong in case of a Judgment, than in case of a Mortgage, or other Estate by Conveyance.

6. A Purchasor from J. S. who has a Decree against him in Chancery for Land, shall be bound by the Decree though he had never notice of it; and yet the Decree in Chancery binds the Person and not the Land, and the Judgment may bind the Person or the Land: And it is hard that the Chancery, whose power is only over the Person, shall execute their own Decrees against a Purchasor, and not assist the Execution of a Judgment at Law: Whereas a Purchasor after a Judgment is as innocent as a Purchasor after a Decree, in point of Conscience.

But the last Objection at the hearing was not made.

Lockner *contra* Strode. 9 February 1680.

Vide *Juxon* and
Morris, fol. 42.
Under Sheriff's
Bond.

BOND entred into by the Plaintiff of 4000 l. to the Defendant, when High Sheriff of the County of Somerset: The Bond was without Condition, but intentionally for performance of Covenants, to save the High Sheriff harmless from Escapes, and to pay the High Sheriff out of the Profits of the Office 400 l.

Jones Attorney General, Insisted for the Plaintiff, that the Bond and Contract for selling and farming the Office, was void by the Statute.

Serjeant Maynard insisted for the Defendant, That it was the Plaintiff's own Agreement to pay it out of the Profits, and the Under Sheriff was but his Substitute; for if the Profits did not extend to 400 l. then he was not to pay so much but to be accountable: And if they amounted to more, the Defendant had no power to call him to account for any more than the 400 l. only.

Besides, the Statute was not Penal, nor inflicted any Forfeiture or other Punishment on the Sheriff, if he had farmed the Office.

Curia. My Lord was of opinion seemingly, That the 400 l. ought to be paid, but referred it to a Trial at Law in Dorsetshire what was the Agreement, whether he was to have 400 l. or no.

Tiffin

Tiffin *contra* Tiffin. 11 Feb. 1680. Vid. Post 55.

L And in question was Mortgaged for Years, and purchased by A. B. from the Mortgagor, the Conveyance was of the Fee Simple to A. B. and the Mortgage Lease to Friends in Trust for A. B. Lessee for Years owner of the Inheritance in Trust for him and his Heirs deviseth the Lands, but the Will not signed by him, the Heir hath a Decree for the Term.

Then A. B. makes his Will after the Month of June 1677. The Will was attested by Three Witnesses according to the Statute, but he died before it was signed by himself; the Devise was to his Wife and made her Executrix, and left her Assets enough to pay his Debts, as was alledged by the Plaintiff, but denyed by the Wives Council, but no Proof as to that was read on either side.

The Will was by the Heir against the Trustees and Wife to have the Term assured with the Inheritance, because by the Original Purchase the Term was to wait on the Inheritance in Equity, which Inheritance did not pass by the Will (e contra) objected, tho' in case of Land the Testator may sign the Will, else void. Yet in case of Personal Estate, a Nuncupative Will is good, and no Subscription is required by the Statute, and this Will is accordingly proved by the Wife in the Ecclesiastical Court, and there may be Debts for ought appears whereto this Lease shall be liable; the Plaintiff's Council cited the Opinion of Hales Chief Justice who took a Difference between the Cases, the Testator's Original Purchase kept the Lease severed from the Inheritance to preserve it from Incumbrances, and where himself after Purchase of the Fee made a long Lease to wait on the Inheritance.

Lord Chancellor said I will neither make a Lease for Years that waits upon the Inheritance where it is not Assets in Law, to be Assets to pay Debts in Equity, and where a long Lease should wait upon the Inheritance, the Inheritance being in Trust in other Men, and the long Lease in the Purchaser and the Purchaser dying indebted, so that the Term in Law will come to the Executor and be Assets to Creditors, there I will not make it no Assets in Equity. Trust of a Term waiting on the Inheritance when shall be Assets.

Dr. Keck offered Reasons with that Difference.

Churchill, e contra, said it was the ancient difference of the Court.

Lord Chancellor affirmed the Difference.

h

Then

Then Keck objected that here was a plain intention of the Testator that his Wife should have it, and the Will tho' not signed is a good Declaration of a Trust of a Term tho' not signed by the Party, because such a Will is good as to a Chattel by the Statute.

Lord Chancellor decreed for the Plaintiff against the Will, and said else the Statute would be of little Effect, for most Estates have Leases, Extents or Judgments waiting on to protect the Inheritance, &c. And if they should be divided from the Inheritance by a Will not signed by the Testator, the Statute would be of little effect.

In this Case I was not a Council, but remembered the Case of Nurls and Yarworth 1674. resolved by his Lordship, which in Reason I thought was contrary to the Reason of this Case; for there a Will which was void as to the Inheritance, yet was made good as to the Lease that waited upon the Inheritance, and the Case there was somewhat stronger, because the Devisee of the Lands was Plaintiff there for the Term against the Trustee of the Term and the Heir, but is here Defendant.

Ellis contra Gnavas.

Heir of Mortgagee decreed to convey to Administrator of Mortgagor.

Where the Heir of a Mortgagee was decreed to convey the Land to an Administrator of a Mortgagor that the Mortgage was forfeited and the Heir in Possession by descent and no want of Assets, and the Mortgagor did offer to redeem, the Lord Chancellor saying for Reason, that the Mortgage Money being part of the Personal Estate, the Land shall go to the Administrator, because the Money would have gone to her. And Quare, if in such Case the Mortgagee should have devised the Mortgaged Lands by Will in writing, but not attested according to the Statute, and that Will proved in the Ecclesiastical Court, whether the Devisee or Executor shall have the Land or Money when clearly he meant the Executor should not have it.

D E

Termino Paschæ

Anno Regis 33 Car. II.

In

CANCELLARIA.

*Sir John Winne contra Sir Thomas Littleton and
his Lady, William Price, &c. 30 April 1681.*

THE Case on hearing was, William Price seized of Land in the County of Flint, Merioneth and Denbigh, conveyed them to Goulsborough, but defezanced for Payment of 1600 l. and Interest to Goulsborough. Sir Richard Winne was party to the Defeazance, and Covenanted with Goulsborough to pay the Money in Case Price failed; and in such Case G. was to convey &c. to Sir Richard Winne who on failure of Payment by Price paid the Money, had the Lands conveyed to him, and entred and enjoyed the Lands divers Years.

Sir Richard Winne being thereof so seized, and seized also of other Lands in other Counties in Wales, whereof part lay in the County of Merioneth (as part of the Mortgaged Lands did, but of no Lands in Flint and Denbigh, but the Mortgaged Lands,) made his last Will in Writing, viz. And thereby devised to the Plaintiff all his Lands, Tenements and Hereditaments, in the County of Anglesey, Merioneth and Carnarvan, or in any or either of them, or elsewhere within the Dominion of Wales. And after the bequest of several great Sums and Legacies, did go and bequeath all the rest and residue of his Goods, Chattels and Personal Estate whatsoever, his Debts, Legacies

Mortgage in Fee Administra-
tor shall have
the Money, tho'
the Mortgagor
(having other
Lands) deviseth
all his Lands to
J. S.

I devise my per-
sonal Estate.

Testator giveth all his personal Estate to his Executor, but nameth none, it is void.

cies and funeral Expences, being first paid unto his Loving, &c. whom he made sole Executor of his last Will, (leaving a Blank). The said Richard Winne died without naming any Executor of his said Will: And the Defendant Dame Ann being his Sister of the half Blood by the Mother's side, and next of Kin, did take Letters of Administration of his Personal Estate with his Will annexed.

And herein the sole Question was to whom the Mortgage Money being now come to 3000 l. should be paid upon Redemption; the Plaintiff claimed it, because by the Will the Mortgaged Lands did pass unto him, and consequently the benefit of the Mortgage Money, the rather for that Richard Winne had entered on the Mortgaged Lands and was in Possession at the time of his Death. And the Devise of the Personal Estate was void, being devised to an Executor and none named.

Where Lands are Mortgaged for payment of Money, the Money is part of the personal Estate, and shall go to the Executors or Administrators, and not to the Heir.

The Administratrix insisted, that now by the Rule and Course of the Court, where Lands are Mortgaged for payment of Money, the Money is always accounted part of the Personal Estate, and shall go to the Executor or Administrator when ever redeemed, tho' the Mortgage be in Fee. simple as here it was, yea altho' the Money be made payable to the Mortgagee and his Heirs, and that in this Case the Personal Estate being devised to his Executor, is a good Declaration that his Personal Estate should go to his Executor, tho' the devise for want of naming an Executor is void as a Devise, and consequently the Money belongeth to her as Administratrix. And it was enforced further, That the Intention of the Testator was only to pass his Paternal Estate, because he does not expressly mention Flint and Denbigh where the Mortgaged Lands lay, saving only Merioneth, where part of the Mortgage lay, but his Paternal Estate also lay there, and chargeth the Devisee of his Lands with a Rent Charge to another Kinsman, which if he should charge the same on the Mortgage would be in part lost upon the Redemption of the Mortgage. And Men when they speak of their Lands, use not to call their Mortgaged Lands their Lands; and when the Testator deviseth by the Words all my Lands, he intended his Paternal Estate.

The Court thereupon and after long Debate decreed the Mortgage Money to the Administratrix.

D E

Term. Sanct. Trin.

Anno Regis 33 Car. II.

In

CANCELLARIA.

Anonymus. 1681.

THE Father and Son within Age, Covenant to convey Lands on valuable Consideration, the Son was infra ætatem, but being now come of Age, the Father is decreed to procure his Son to convey.

Anonymus. 1681.

Queen Elizabeth founded the Hospital of in and appointed five Poor therein, Revenue of each poor Person to have therein 8 d. per Week, and 8 l. per Annum to the Guardian, and made a Prebend Rector of the Cathedral of pro tempore ex- isten' Guardian; the Land so given to the Hospital is now improved to be worth 60 l. per Annum. Now the Suit being in Chancery for the poor Brethren to have increase of Maintenance; it grew to be a Question, whether the Guardian should not have Increase also: And the Decree was that all above 8 l. per Annum should be to the Poor only. Some of the Council made a Difference between this Case and where the only Imployment was to be a Guardian, for here he is made Guardian who is a Prebend.

Anonymus.

Anonymus. 1681.

Devise of Lands
to pay Debts.

Trustees being
Creditors pay
themselves first.

All Creditors e-
qually concern-
ed where trust
of Conveyance
is to pay Debts.
Trust.
Debt.

No Difference
to be made in
payment be-
twixt Debts by
Promise and
Debts by Speci-
alty, but equal
in Proportion.
On Bill of Re-
view, 35 Car.
2. this Decree
was revert by
the Lord Keep-
er North in one
Point, viz. that
those Creditors
who had re-
ceiv'd their Mo-
neys should not
refund any part
of that which
they had re-
ceiv'd.

SIR John Gell and others who are Creditors of Charles Agard deceased Plaintiffs, against John Adderly and others Trustees of Charles Agard, and against Smith Administrator of Charles Agard, and also Creditors of Charles Agard and other Creditors of Agard, and against other Purchasers of his Lands. The Case on hearing was, viz. Charles Agard seised in Fee of Lands, and indebted to divers Persons conveyed his Lands to the use of himself for his Life, and after to the use of his Will, and by his Will devised the Lands to Adderly, Orme, &c. for payment of his Debts and died. The Trustees being Creditors of Agard, and bound with him as his Sureties, after this Suit sold the Lands, paid themselves and other Creditors to whom they stood Bound, and the Plaintiffs being also Creditors unsatisfied, and nothing left to pay them, their Bill was to have proportionable Satisfaction. At hearing the Lord Chancellor decreed accordingly, and declared,

That when a Man settles his Lands for payment of his Debts generally, then all his Creditors are equally concerned and intitled, and none is to be preferred before another, and in this Case Debts without Specialty are to be in the same Condition, and equally regarded as Debts by Specialty; for tho' there be a difference in Case of Executors who are to pay Specialties before Promises, that is an artificial preference by Law, but naturally a Debt by Contract without Specialty is as just as the other. And the Conveyance to the Trustees being themselves Creditors, and Sureties for a Guard, doth not give them any preference before others, but they must be in the same Degree in point of Payment and Satisfaction as other Creditors were. And tho' some Circumstances in this Case might give Hope or Confidence to the Trustees that they might prefer themselves, viz. that Adderly was his Servant, Orme lent his Money at the time when the Conveyance was made, and some Speeches tending to declare such Trust, yet that alters not the Case; besides such Declaration was since the Statute of Frauds and Perjuries.

But

But as to the Personal Estate, the Administrator may according to Law so far as that goeth, prefer himself so far as the Personal Estate extends, but no further.

Tiffin contra Tiffin. Vide ante 49.

SIR Roger Martin seised in Fee of Lands in Long-Melford, &c. Mortgaged the same for Years; Robert Tiffin agreed with Sir Roger Martin for the purchase of the Lands and paid the Mortgagee, and bought the Inheritance of Sir Roger Martin who conveyed the Inheritance, viz. the Reversion of the Mortgage to Robert Tiffin, the Mortgaged Lease for Years was conveyed to Tucke and Groom in Trust for R. Tiffin; R. Tiffin seised in Fee of the Reversion, and Interested in the Lease for Years, ut supra, in Trust to wait on the Inheritance, makes his Will in Writing, and thereby deviseth the Lands in Question to J. S. for Life, and afterwards in the same Will deviseth the Lands in Question, and all his Lands, Tenements and Hereditaments, (naming none by Name) to his Wife, charged with several Sums of Money, and makes her Executrix; he after his Death proves the Will, and takes Administration cum Testament annexo, no Executrix being named in the Will. The Will was made after 1674. to wit in August 1679. the Plaintiff as Petr to the Devisor exhibits the Will against the Administratrix and Devisee, and against the Trustees of the Lease. The Cause came to be reheard on Petition of the Wife, (for the Cause was decreed against her formerly, because the Lease was to wait on the Inheritance.) And the Will (as to the Inheritance being made after 1674.) and not Signed or Attested pro ut the Statute, was void. I was not at the first hearing of Council, but now with Mr. Solicitor and Mr. Keck, offered to the Consideration of the Lord Chancellor.

Statute of Frauds
and Perjuries.
Will.

Term.
Inheritance.

1st. That it is true the Will is void and effectual, quoad the Inheritance and Free-hold.

2^{dly}. But is good and will take effect as to the Lease and the Trust thereof, altho' that such a Lease regularly shall wait upon and go along with the Inheritance, but such attendance of the Lease is not by Law, but is a Creature of this Court, but this Court will never make it to go

go with the Inheritance, if Equity be against such attendance, and therefore if a Man purchase Land as in this Case, and take a long Lease in his own Name, and the Fee in Friends Names in Trust for him and his Heirs, and dieth indebted without other sufficient Assets to pay the Debt, the Executor shall retain the Lease to pay the Debt, and the Lease shall not wait on the Inheritance contrary to the express intent and meaning of the owner of it, and the meaning of Parties, and therefore if the Cestuy que trust of a Term that in Equity should wait on the Inheritance, should recite in his Will that he was Cestuy que trust of it, the Reversion in Fee to himself, and should thereby devise the Term for payment of his Debts or to younger Child, this would be good in Equity. The Devise to the Wife in this Case is good to her, tho' by general Words, but the general are as strong as if they had particular Names, for he had no other Lands. As a Devise of all Lands will carry a Term for Years in Lands, if there be no other Estate of Lands in the Devisor but for Years. Lord Chancellor decreed for the Heir against the Wife, because else the Statute would be easily avoided, and of small Effect and of dangerous Consequence, for few Men's Estates of value but have Leases or Incumbrances by Statute or Judgment, &c. waiting or proteding the Inheritance, and if they may be disposed by Will made without those Circumstances which the Statute requireth in Case of Devise of Inheritance, notwithstanding the Statute, the Statute is of little Effect.

A Question was moved that this Will was not according to the Statute: But the Lord Chancellor himself who moved it answered himself, viz. As to that, That it was proper to be objected in the Court Ecclesiastical, and being under probate it shall be intended good here.

Dashwood *contra* Elwall. 20 June 1681.

Factor takes Security in his own Name, without Notice of it to his Principal. Merchant. Factor.

D. Employed E. a Citizen of Exeter to sell for him divers Irish Commodities, which E. received for D. who dwelt in London; E. sold the Goods in Trust, and took Bond for the Money, viz. so much as came to 300 l. and died; the Defendant his Son is sued for an Account, the Question was whether the Bonds be a good Discharge, for the Obligors were failed since the

the Bonds taken, for it was said the Bonds were taken the better to secure the Debts, for the Buyers were Tradesmen as dealt in Wool, and they would be bound to Elwall their Neighbour whom they knew, but not to Dashwood whom they knew not.

E contra, It was objected, that tho' a Factor having a general Commission or Authority to Sell or Dispose of Goods, may Sell or Dispose on Trust without special Warrant, Order or Restraint, and may give day of Payment, Yet he cannot take Security by Bond in his own Name, especially without Authority to do so, or at least giving timely Notice to his Principal of it, else 'twill be in the power of a Factor that deals for several Merchants, and for himself also, taking Securities by Bond in his own Name, if any of the Debtors fail to gratifie whom he pleaseth with the good Securites, yea himself, and play the Securities good or bad into his own Hand, or into what Hand he pleaseth, which will put a strange Power in Factors, and be extreamly prejudicial to Trade and Merchants: So in the Case of Gibbon and Doyley, where the Testator gave Residuum Bonorum to be divided among Sixteen of his Kindred by Name, as his Executor should voluntarily without Compulsion of Law declare; The Executor divides to fifteen, and they were satisfied, and was willing to pay the rest to the Sixteenth who now sued for an Account of what the residue was; the Executor pleaded the matter in Bar of the Account, offering to pay the Sixteenth Man the Plaintiff, such a Sum which was as he pleaded the Sum left. But the now Lord Chancellor disallowed the Plea, because heed was to be taken that we make not such Examples, under which dishonest Men may shelter themselves. And if this Power should be allowed to Factors, dishonest Factors will have a very safe shelter, and it will be impossible to discover what Goods he sells for one, what for himself, and what for others. If an Executor hath Orphans or other Men's Money in his Hands, and hath Power to lend it, if he do so and take Security in his own Name, which faileth, he shall answer the Debt of his own Money, unless that he endorse the Bond, or do some other thing at the time of lending the Money or taking the Security, which may doubtless declare the Truth, &c. And in the present Case, the Factor by taking the Bond in his own Name hath disabled his Merchant ever to recover against

Factor that hath a general Commission may sell on trust.

But cannot take Bond in his own Name.

Prejudice Merchants.

Gibbon and Doyley.

the Debtor, who knowing no other but that the Goods sold were Ellwalls, and giving him Bond for it, there now is no Remedy for the Debt at Law but in Ellwalls Name on the Bond, which was otherwise before the Bond was taken.

The Lord Chancellor put the Defendant to prove that the Testator Ellwall gave particular Notice to the Plaintiff that he had sold on Trust and to whom, whereupon a Letter of the Testator to Dashwood was read, wherein he gave Notice of the Sales to Bartlet and his falling. The Will was referred to a Master.

Nota. There was no Notice of the Bond in the Name of Elway not till after Bartlet was failed.

Newcomb and Dorothy Uxor contra Bonham and Alice uxor.

Mortgage.

A Nthony Young being seized in Fee of Lands, and a House and Mill of 100 l. per Annum value, (the Plaintiffs proof was 114 l. the Defendants proof 95 l. the Medium 103 l. or thereabout) and being indebted 1000 l. and his Mother seized of 60 l. thereof, to receive out of the Premises in Possession for her Life, the Reversion to him, agrees with the Defendant who had Married Alice his Sister, that if he would furnish him with 1000 l. whereby he might be enabled to pay his Debts, and have no Interest for it during the Life of Anthony, unless he, viz. Anthony Young during his Life should think fit to repay it with Interest, then he would so settle the Premises as that he might enjoy the Premises during his Life, and that the Premises should be settled to come to the Defendant and Alice his Wife for their Lives, and to the Heirs of the Defendant after his Death, and that he should have Power during Life to redeem on payment of the 1000 l. with Interest, but his Heir should have no Power after his Death to redeem, but the Defendant should absolutely enjoy the Premises, and gave this Reason, viz. that he might Marry and have Children, and therefore would have Power during his Life to redeem, but his Heirs should not, and gave such Instructions to draw assurances accordingly, which was accordingly deposed by the Party who drew the assurance. The assurance drawn was a Conveyance to Bonham and his Wife, and the Heirs of Bonham; and Bonham and his Wife redeemed the Premises to Anthony Young for 99 Years, if he lived so long, and a Covenant,

nant, that if Young during his Life should pay to Bonham 1000 l. with Interest from the Deed on six Months Notice, then Bonham and his Wife to reconvey, and in enforcement of the Defendant's Title against a Redemption by the Plaintiff Dorothy the Heir of Young, who was the Daughter of Young's Brother. It was proved that she had offended him, and he had declared she should not inherit him; that Alice being his Sister, he had kindness for her. And this Case was not like other Mortgages which are mutual.

But a Redemption was decreed by the Lord Chancellor, and the Personal Estate to be applied to aid the Heir towards satisfaction of the Mortgage, because it was a Security, and being so, could not be extinguished by any Covenant made at the time of the Mortgage. The Defendant pray'd a rehearing. 'Tis true, that if it were a Mortgage no Covenant should alter it, but this is not a Mortgage, but an Especial Contract, made not in Consideration of lending of Money, but on Consideration of Blood and Accommodation of the Affair and Necessity of Anthony Young, and to settle his Estate in his Blood; for he was resolved before this Conveyance was made on Two things, 1. By reason of the unkindness of his Niece to him, that she should not have his Land as Heir. 2dly. That if he had no Issue of his own, that then the Defendant Alice should be his Heir and have his Land. But then he considers his own Condition, viz. he was indebted 1000 l. which chargeth him until that were paid, with 60 l. Interest per Annum, besides incident and increasing Charges by renewing of Bonds, Broakage, &c. And as to the Condition of his own Estate to answer the Debt and Interest of his Debt, his own Estate was in Possession but 40 l. a Year, which could not answer the Interest, viz. 60 l. nor ever satisfy the Principal, neither could he have 1 d. out of his Estate to maintain him.

Thereupon he further Considers what way to take to debar his Niece who had disobliged him so highly, as to beget in him such a Resolution as that she should not have his Land, and to prefer his Sister who was nearer in Blood than his Niece, to which he had three Motives, viz. The nearness of Blood. 2dly. Kindness of the one and Unkindness of the other. 3dly. His Sister had Children, but his Niece had none. So that probably if his Sister had his Land, then it would remain in his Blood still, of which he saw no hope in the Niece.

3dly. This Resolution to prefer his Sister was not so absolute, but he would first provide for his own Children if he should have any: This is provided for by the Covenant to redeem during his Life, and the limitation to redeem only during his Life, provides for his Intention touching his Sister.

4thly. On all these Considerations, he himself contrived a way that if it might be effected, and will answer all these Ends, viz. Free him from his present Pressure, want of Maintenance, and free him from present Interest of 60 l. per Annum, give him present Maintenance of 40 l. per Annum. with expectation of 60 l. more after his Mothers Death who was Jointred therein, and then he had hope of a Portion with a Wife to redeem the Estate in his Life-time, and so become a free Man.

And accordingly he makes the Conveyance ut supra, which is not any way suitable to, or like an Ordinary Mortgage which Scrivenors make.

1st. There is no Use to be paid during his Life, so that he is freed from Clamor of his Creditors and Debts.

2dly. There is no Covenant on his Part ever to repay either Principal or Interest but at his own Pleasure, so no Interest or Principal could be required of him.

3dly. The Land is conveyed to Bonham and Alice his Wife, Sister of Anthony Young, and the Heirs of Alice the Wife, which were a strange and unreasonable way of Mortgage, that the Husband's Money should be lent and the Security be the Wifes; but this was to comply with the intention above, that the Land in Case he had no Issue should remain in his Blood.

And it was not unreasonable in that Case that the Estate must go to Collaterals and Females, to prefer a Sister before a Niece, especially when the Sister had Children, but the Niece none.

Object. Here is a Power to redeem, and it shall never be extinct by any Covenant at the same time.

Resolv. This indeed is an usual way of borrowing, no Clause shall alter it.

But

But this is here a special Contract, on special and necessary Occasion, and is not properly a Mortgage; it is *Contractus innominat*.

The mischief of the Objection is, if it should be, &c. then it would be a way to Oppression, and rigorous Exaction and Oppression of necessitous Men by Usurers, but here it is quite contrary.

The special Circumstances of this Case distinguish it from other Mortgages, and never like to be drawn in Example, for who will lend Money on such Terms, viz.

1st. Never to be able to demand Principal or Interest, but to be wholly in the liberty of the Borrower, especially considering that the Principal and Interest Money would exceed the value of the Land; as here, if Alice had lived it might.

But yet this is a more special Case, viz. Consideration of Blood, and a Consideration not express may be averred, tho' not express in the Deed, and so we do, and so it appears.

And the worst of the Case amounts to no more than this, viz. if he by Marriage or otherwise should not be enabled to redeem, his Sister should have his Land rather than his Niece.

In case of a Mortgage the Mortgagee may exhibit a Bill to discharge the Equity of Redemption, and is an incident to the Mortgage which cannot be in this Case, &c. Ergo, &c.

The great Reason & e contra, is the Mischief that would ensue to Men in want, who are enforced to borrow Moneys, for their necessity will induce or enforce them to submit to any Conditions. And therefore in general, and prima facie, the Rule is good, that when a Mortgage is made, no Covenant or Agreement in the Deed of Mortgage shall make it unredeemable on failure of Payment, and therefore if a Mortgage be to redeem for Years, or during the Life of the Mortgagor or Mortgagee, and not after, the Mortgage in Equity may be redeemed after, for it is a trivial Clause, (not after) and is contrary to Equity in the Creation of it, and would be of evil Consequence, for every Lender would make himself Chancellor in his own Case, and prevent the Judgment of this Court in a Case proper for the Court, and this were a general Mischief.

There.

Therefore first Consider if there be any probability of such mischief in this Case, such as should destroy the express Contract and Agreement of all the parties made without Surprise or Consideration.

To which end observe how much this Case differs from ordinary Mortgages, and how unlikely to be imitated by Money lenders, and to be drawn into Practice or Example.

1st. In other and usual Mortgages Interest is payable till time of Redemption, here none by Agreement.

2dly. The Non-payment of Interest is not for any certain time, as for so many Years, but none to be paid during Life, and that during the Life of the Mortgagor himself. Where is that Money-lender that will lend on such Terms? For here he can never know as long as the borrower liveth, whether he or his Heirs or his Executors shall be owners of Land or owners of the Money. In Sir

Wollaston's Case, a Redemption of a Mortgage at the Suit of other Creditors was denyed, because of the length of Time, because there ought to be a time when the Mortgagee may be certain of his Interest, either of Land or Money.

3dly. This is enforce'd from this, That in all Causes of Mortgages regularly, the Mortgagor hath Equity on his side to have a Decree to bar Redemption on failure of Payment, as well as the Mortgagor to have Redemption; the Remedy is equitable and mutual. Regularly and ordinarily, this is so, but it fails on the Mortgagor's side during the Mortgagor's Life, Then 1. This is not an ordinary Mortgage, because not subject to the Rules of Mortgages. 2. And this Circumstance doth make the Case not likely to be mischievous in Consequence, for no Man is like to lend on such Terms.

4thly. The value of the Land conjoined to these former Considerations is very material; the Land in Possession at most but value 40 l. per Annum, besides Taxes, Duties to the Church and Poor, and the reversion of an Estate of a Jointress in Being, and no possession of the 40 l. per Annum during Young's life; so in effect 'tis a Reversion after one life of near 100 l. per Annum, viz. 40 l. per Annum for one life, 60 l. per Annum after two lives, and this conveyed for Security of 1000 l. no Interest to be paid during Young's life.

The

Part 60 l. per Annum,
A Mill.

The 60 l. after two lives 7 Years
purchase.

600 l. at 7 Years purchase 420 l.

40 l. after one life, 9 Years pur-
chase 360 l.

10 Years 400 l.

So that we have a bad Purchase, &c. if absolute, but if Young had lived 9 or 10 Years a miserable Bargain, and yet he might have lived 20, 30, yea 40 Years.

Surely he must be sick of his Money that will take this for a President, so as there is no fear of the ill Consequence.

Object. Here Young died quickly.

Resolv. He might have lived long, and the Event changeth not the nature of the Agreement.

What Man in his Senses would go by such a President or Example.

If Young had lived 7, 8, 10, 20 Years, the Court would not have relieved him, much less his Heirs.

Two other Reasons, &c.

1. From the Condition of his Estate.

2dly. Of the Consideration, &c. not only of Money, but Blood and Kindred was the Consideration of the Conveyance.

Object. Consideration of Blood is not mentioned.

Resolv. It may be averr'd and is fully proved.

*The Lord North Chief-Justice, and Champernoon
contra Williams. 21 June, 1681.*

THE great and ruling Point in the Case was, whether Cestuy que trust in Tail, suffering a Recovery and no Tenant to the Præcipe, but being in Possession under the Trustee who had the Freehold in him, but was no party to the Recovery, but Cestuy que Trust in Tail was the Tenant, should bar the Remainder in Fee of the Trust. The matter was much debated on reason and Pre-
sidents,

*Cestuy que trust
in Tail suffers a
Recovery, its
good.*

sidents. The Lord Chancellor decreed it a good Bar, and took a Difference, viz. if that there had been a Cestuy que Trust of a Trust for Life before the Trust in Tail, so that in Case the Estate in Law had been executed according to the Trust, and consequently the Tenant in Tail could not have barred the Remainder in Fee if he had suffered a Recovery, there Cestuy que trust in Tail should not bar the Remainder by a common Recovery if there was no Tenant to the Præcipe. He said also that a Trust is a Creature of Chancery, and is not within the Statute of W. 2d. de donis, &c. and tho' if Tenant in Tail of a Trust cannot bar the Remainder by Fine, yet if he makes a Feoffment or Bargain and Sell, he may bar his Issue.

Draper's Case. July, 1681.

Joint-tenants or
Tenants in
Common.

SIR Andrew King made his Will, wherein he deviseth in these Words, viz. All the rest and residue of my Estate whatsoever, both real and personal, I bequeath to my Executors the Survivors and Survivors of them, to the Intent and Purpose that they do with all Care and Diligence as soon as the Money can be conveniently raised upon Sale of the Premises, and out of the Rents and Profits which will accrew out of my Office in the Custom-house, the Lease of which and the Proceed and Benefit thereof I intend should be preserved for the Benefit of my Executors, to pay and discharge all my Legacies and Debts.

Sir Andrew King made Edwards and Draper Executors and died, Edwards paid the Legacies and Debts and died; Draper survived, and when all is satisfied, then my Will is, that the Term which shall remain in the Lease of my Office in the Custom-house and the benefit thereof, shall be and remain to my Executors share and share alike for their Care and Pains in Execution of this my Will.

The Executors were Draper and Edwards.

The Question was, Whether the Testator having in the former part of his Will given all his Estate Real and Personal to his Executors the Survivors and the Survivors of them, but in the latter Clause given the Term in his Office to them, share and share alike, the Executors are Joint-Tenants of the Term, or Tenants in

in Common; by the first Clause they are Joint-tenants, but the latter Clause (share and share alike) seems to contradict it, and the surviving Executor claims the Term by Survivorship.

Lord Chancellor, If a Man devise to his Executors, or make several Men his Executors, the Survivor must carry all since the Judges will have it so. (Note this was his very Expression, Vid. Sup. fo.) Yet when the Testator makes a distinction between the Term in the Office and the generality of the Estate, so shall I, and so he decreed the Term to be in common not to survive.

Rep. Methinks the first Clause, a Devise to Executors to pay Debts and Legacies is no Devise or Legacy, prout Dyer.

D E

Term. Sanct. Mich.

Anno Regis 33 Car. II.

In

CANCELLARIA

The Company of Stationers. 15 Novem. 1681.

On Plea and Demurrer.

Stationers Patent Prerogative.

THE Company of Stationers complain by Bill against Lee, for that whereas by Patents the 3d and 4th. of Philip and Mary, the sole Printing and Trading in Almanacks was granted to them; the Defendant did Print and cause to be printed and vended secretly Almanacks, and imported others from Holland, printed there, and sold them, and prayed Discovery. The Defendant demurred and pleaded: The Demurrer was in effect to the Plaintiff's Title, that it was not good in Law, and that the Bill was only to discover a Tort, as if a Bill should be to discover a Trespass in Lands or Goods.

The Plea was, that he had been Seven Years Apprentice to the Trade of a Stationer in London, and free, &c. And the Custom of London was, that in such Case any free man might use any Trade, &c. The Plea and Demurrer were over-ruled, and the Defendant to answer the Bill.

At which Hearing the Case and Proceedings following were cited.

7 July, 14 Car.
2. Stationers.

Richard Atkins Esq; and Martha Lady Acheson his Wife, Plaintiffs, and George Moore, Miles Fleisher, and others of the Company of Stationers, London, Defendants.

It

It was then alledged, that the Plaintiff, the Lady Acheson being sole Daughter and Heir of John Moore, who by Letters Patents from King James, had the Priviledge of sole printing all Books which concern the Common Laws of England: and the said Moore by his Will made George Moore and others Executors in Trust for the Use and Benefit of the said Dame Martha, to whom he gives all his Leases, and so the Benefit belongs to the Plaintiff's, and yet the Defendants &c. do take upon them to Print and Publish the said Law Books without any Authority from the Plaintiff's for Relief wherein, the Plaintiffs have exhibited their Bill, and the Defendants being served with Process have accordingly appeared, but have not as yet put in any Answer thereunto, as by Certificate then appeared.

It was Ordered, that an Injunction be awarded against the said Defendants, their Servants, Agents and Workmen, thereby injoyning them not to proceed in the Printing of any Law Books till the Defendants should directly answer the Plaintiff's Bill, and this Court take other Order to the contrary. Vid. post.

May it please your Lordship, We have severall times met together and Considered of the Case then annexed according to an Order bearing date the 13th of April 1668. 16 Feb. 1668. and are of Opinion,

That such new Law Books as have been imprinted since Moore's Patent, and acquired by any particular Person or Persons, are not by Law restrained by Moore's Patent. But notwithstanding that Patent, those Men who have acquired them may Print, but as to those Law Books that were printed before that Patent, there are among us diversity of Opinions.

Jo. Kelinge, John Vaughan, Matth. Hale, Thomas Twisden, Thomas Tirrel, Christopher Turner, John Archur, Richard Rainsford, William Morton, W. Wyld.

Upon hearing Council on both parts this day at the Bar, to argue the Errors assigned by John Streater Plaintiff, in a Writ of Error depending in this House, which Abel Roper, Francis Tytan, John Starkey, Thomas Bassett, Thomas Collins and John Place commenced against John Streater, concerning the Priviledge of Printing Law Books. 26 May 1675.

Books. After due Consideration had of what was offered on either part concerning the same; It is Resolved and Adjudged by the Lords Spiritual and Temporal in Parliament Assembled, That the Letters Patents pleaded in Bar of the Action brought in the King's-Bench, were and are good in Law, and that the said Judgment given in the Court of King's-Bench for the said Abel Roper, &c. against the said John Streater is therefore Erroneous, and shall be and is hereby reversed.

Jo. Brown.

Cleric' Parliament'.

Countess Downes contra Moreton, 16th.
November 1681.

Consideration
defective when
supplied.
Intention.

SIR Lucy, late Husband of the Plaintiff, Articled with her Father before Marriage in Consideration thereof, and 6000 l. to settle 1000 l. per Annum in Lands, &c. on her for Jointure, but not mentioning the particular Lands, and after Marriage settled on her int' alia, his Farm in D. called Hasledon and Woods in called A. the Farm part of it lay as in the Bill named, and part of 60 l. per Annum lay not there, and so of the Woods, and if Relief should be here for the part lying out of these Wills, which were not well conveyed (as it was agreed on all sides, the Conveyance was so penn'd that they did not pass) was the Question; but afterward the Husband being made Earl of Downe, made a farther Conveyance to some friends whereby 500 l. per Annum of other Lands were settled on the Lady for her Life: The Husband died, the Heir entred into that part of Hasledon Farm, and of the Wood not conveyed. It was proved by many Circumstances, and the Acknowledgment of the Husband, that he had settled the Farm of Hasledon, and thereupon the Lord Chancellor decreed it to the Plaintiff. If the Bill had been only to supply the defect of the Jointure, because it was not included in the Jointure, he would not have relieved, because his Subsequent Augmentation might be in Recompence; but the Husband conceiving and declaring that he had settled the Farm, the second was not a supply of a defect, but a farther voluntary Provision, which would not

not have bound his Heir being but voluntary, and therefore as to the defect of value in the Woods he did not relieve the Plaintiff, for that as to them there was no Proof of his Intent, that he had already settled them, and tho' his Covenant was to settle 1000 l. per Annum, and there was want of value (they were 100 Acres) he would not decree as to them, and did not decree them; yet as to the Farm, he did decree for the Plaintiff not to supply the Value, but as that which he intended to settle, and as he thought he had settled, and so had acknowledged divers times not to supply out of the Covenant, but to establish what he intended to settle.

Anonymus. 16 Novemb. 1681

COnfisee of a Statute by Sir Philip Howard took him being now a Servant of the King in Execution. He complained by motion in Court of this as a breach of his Priviledge being Servant to the King, who ought not without leave to have been Arrested. The Party shewed that before he proceeded, he acquainted Sir Philip Howard of his Purpose, and that thereupon Sir Phillip Howard waived his Priviledge. Lord Chancellor, The Priviledge is the King's Priviledge, and not Sir Philip Howards; you have been unmannerly towards the King and broke his Priviledge, you might as well have taken the King's Coachman driving the King's Coach. The Party protests all Respect to the King; &c. However said the Lord Chancellor, I will not discharge the Execution, but ordered the Warden of the Fleet to take him into Custody, but because of the Consent to discharge Sir Phillip Howard of Execution, the Chancellor propounded that new Security should be given for the Debt, which the Party by his Council consented to, so as it might be a Statute of 2000 l. which seemed to the Chancellor to be too much, because the Debt was but 500 l. Council for Defendant, There are Sixteen Years Interest behind; but at last it was referred as to the Manner and quantum of the Security, and the party discharged of the present Commitment.

Nota. In this Case there was no Bill depending, all came in by way of motion.

N. Pro-

N. Progers *contra* the Lady Fraſer, *the ſame Day on a Plea.*

The Caſe was.

Cuſtody of an
Ideot to one
and his Execu-
tors during the
Ideocy.

MRS. Dennis being found an Ideot by Inquiſition, the King granted the Cuſtody, &c. of the Ideot, and of her Eſtate Real and Perſonal to Sir Alexander Fraſer, his Executors, and Adminiſtrators during the Ideocy he dyed. Progers got a ſecond Grant from the King, and ſueth the Lady, for the Lands, &c. ſhe being Executrix of her Huſband, and Deviſee of the Cuſtody, which ſhe pleads in Bar. The Queſtion was, whether the Grant to Sir Alexander Fraſer were ended by his Death? Firſt, it is a Truſt in the King, and therefore is not grantable to Executors and Aſſigns. Secondly, The like Grant was never made before. Thirdly, It cannot be ſo granted, for if the Party die Inteſtate, who ſhould take care of the Ideot, therefore the Office of the Marſhalſea cannot be granted for Years: And Fourthly, what Eſtate can the Grantee be ſaid to have?

E contra, it was ſaid, 1^{ſt}. The King hath not only a Truſt as in Caſe of Lunacy, but an Intereſt; for he hath and may diſpoſe of the Profits to his own Uſe, and grant them over, and it being a Chattel naturally ſhall go to the Executors of the Grantee, and it is a ſpecial Intereſt, not properly a Term, like Manning and Drake's Caſe, where a Man hath Power to enter and take Profits till 100 l. paid, and Corbet's Caſe, 4 Coke: And in Caſe of Wardſhip there is an Intereſt and Truſt conjoined; for the Law truſts the King and his Grantee to educate and maintain the Ward, and ſo muſt be done in Caſe of Ideocy, as to Maintenance of him or her.

Lord Chancellor ſaid the Caſe of Ideot and Ward are not alike, the Wardſhip is by reaſon of Tenure, the Ideocy by Prerogative; and ſaid he thought the Caſe of Goalerſhip not grantable for Years too eaſily ſlipped over. But the Caſe was put off, for he remembered a defect in the Inquiſition which found Dennis not an Ideot a Nativitate ſome certain time.

Coventry, &c. *Executors of Sir Henry Thinn contra Thinn now Executor of Sir James Thinn*, 18 November, 1681.

SIR Thomas Thinn 1639. treated with the Lord Keeper Coventry for a Marriage between Sir Henry his Son, by Katharine his second Wife, and Daugh-
ter of the Lord Coventry, the Portion 4000 l. which was
paid. Hempsford, &c. to be settled on Henry, &c. The Decree for
Deed of Settlement was executed by sealing and deli- Mean Profits
very of it, it being by way of Covenant to stand seized, after a former
but wanted the words (Shall be or shall stand seized) Decree for En-
and so was in Law defective. Sir Thomas after the joyment.
Marriage died, great Suits happened between Sir James,
Petit at Law, and Sir Henry, for Sir James entred on
Sir Henry, 1648. Sir Henry Thinn exhibited a Bill in
Chancery against Sir James on the Agreement, and had a
Decree 1650. against Sir James, which was for enjoy-
ment, but no further, not for further Assurance or mean
Profits, Sir James continued Disturbances. Sir Henry
Thinn 1659. brings a second Bill, but that being ill pen-
ned he had leave to amend it, and made Suit for the
mean Profits, it abated by death once of Sir Henry
Thinn; and Sir James Thinn also dying, now the Bill
is for the mean Profit.

Against the Plaintiffs the Objections were: 1st. The
length of Time; but that was answered by the many
Suits and Abatements of them.

2d. Objection. That it is irregular and improper to
have a Bill for the mean Profits now, when Sir Henry
Thinn had a former Decree for the Enjoyment 1650.
for he then ought to have had a Decree also for the Mean
Profits: And it is to be presumed that the Court did
then see Cause to make no Decree for the Profits, in re-
gard Sir James had a good Title in Law, and the Times
were troublesome, and the Possession a stumbling Posses-
sion, sometimes with one of them, sometimes with the
other; however 'tis not reason now to patch up the for-
mer Decree by a new one.

The Reply was, 1st. The former Bill demanded not
the Mean Profits nor an account thereof.

2dly. It

2dly, It was not unjust by one Bill first to clear the Title by one Bill, and then to exhibit another for the Profits; and it was not reasonable till the Title was cleared to the Principal, the Mannor settled while Sir James set up Titles to the whole, one while by an Intail which avoided the Settlement, if not cut off, another while for want of Tenant to the Præcipe in the Recovery which docked not the Intail as to several Tenements.

But those Questions being settled by several Verdicts, now and not before was time to have an account; and 2dly, after a Decree for Enjoyment it is proper to exhibit a Bill for the Mean Profits, or as the Case may be, for further Assurance or for the Evidences.

And for these two last Reasons, and particularly for the last Reason, the Lord Chancellor decreed the Executors to accompt for all Profits by him, his Agents and Bailly received since the Decree 1650. (Quære, if not the exhibiting the Bill 1648.) but not for all Profits, which he did or might receive without his wilful default, as in some Cases is usual.

Perrat contra Ballard. 22 Novemb. 1681.

Bankrupt.
Notice.
Purchasor.

THE Defendant bought of Portman Jewels, Plate, &c. for valuable consideration paid: Portman became a Bankrupt, and a Commission was taken out against him, and the Commissioners examined Ballard, the Defendant, touching the Goods what they were, and the value of them, but on pretence that he did not answer the Commissioners committed him; but on an Habeas Corpus in the King's Bench he was delivered. The Answer before the Commissioners being as to the time, &c. to his remembrance, and that he could not positively answer farther, and by consent he was again to attend and be re-examined, which he did.

And now the Plaintiff's Bill is to have the Defendant's Answer in Chancery where he pleaded, that he had no Goods of Portman's but such as he really paid for before the Commission issued against Portman, and that he had no notice of any act or thing by Portman whereby he was a Bankrupt, but truly paid for what he bought, &c.

It

It was objected he ought to answer the time of the Bankruptism, else the Statute against Bankrupt will be of little effect.

E contra, It is no Equity to make a Man in such Case pay twice.

Lord Chancellor ruled the Plea good, saying, It is an infallible Rule, that a Purchaser for valuable Consideration shall never without Notice discover any thing to hurt himself. But as to the point of Bankruptism, whether that the Defendant being formerly examined by the Commissioners on Oath, should be examined or put to answer to the same matter here, The Chancellor seemed to be of Opinion that he should. But the other Point being clear, there was no debate on this Point.

Pit contra Hunt, 20 Novemb. 1681.

The Wife before Marriage being possess of a long Term for Years, and A. the Person who was to marry her being indebted 400 l. to J. S. by Agreement of A. and J. S. makes a Lease to J. S. for 10 Years to secure payment of the 400 l. the Lands being then accounted 80 l. per Annum, as is alledged, and by Indenture sealed in presence of her Husband, assigns the residue of the Term to Friends in trust to be at her disposal, whether Sole or Covert, (but no other Words then, so to exclude her Husband) and brought in Money and other Estate to the value of 600 l. She marries; after the Creditors of her Husband (after June 1674.) obtains Judgment in Debt against him. And on Fieri fac. the Sheriff sells the residue of the Term; the Vendees have now a Decree against the Trustees of the Wife for the Term, because the Lords in Parliament had reversed a Decree obtain'd by the Lady Turner who Married Sir Edward Turner, who sold Land wherein Trustees for her had a Term for Years, and the Chancellor held it not fit a Decree should be one way in Parliament and in another way here, but declared it against his own Opinion, for else Widows cannot in most Cases provide for themselves. Vide, Awcher's Case, &c. and the Husband in this Case forsook his Wife, refused Reconciliation, allowed her nothing, &c. yet decreed ut supra.

It seems to me that this Case differs from Turner's, first because there the Assignment of the Term was on a former Marriage, which Husband being dead, she became owner of the Trust as a Feme Sole, and as to the second Husband all one, as if she had created a Trust for her self of a Term. Secondly, the Assignment here is with consent of the Husband, whose Creditors can have no more Right then he had, but Turner did not consent, &c.

Newland *contra* Horsman. 23 Novemb. 1981.

Master, Mer-
chant, foreign
Servants exa-
mined.

Horsman being Owner of the Ship called, &c. whereof Ford was Master, B. the Plaintiff treated with a friend of Horsman's for hire of the Ship, and a Charter-party was sealed by B. and Horsman, by which Horsman agrees that the Ship shall sail to New England to take in fish on the account of Newland, and thence to Barcelona, and there to deliver the fish. Newland covenants with Horsman to pay the freight on delivery of the fish; the Ship arrives at Barcelona, and the fish is delivered to one Dalmacie: Ford the Master demanded of Dalmacie the freight, and Dalmacie demands a Deduction out of the freight, pretending that there wanted 170 Kintals of fish of what was to be delivered, and that the part of that which was delivered was damaged; thereupon the Master sues Dalmacie in the Court at Barcelona for freight; Dalmacie sues likewise for deduction of Damages; the Court there ordered the whole freight to be brought into Court, and Consideration to be had for Damages for Dalmacie; thereupon Dalmacie appealed to a Superior Court; then Dalmacie removed the Appeal on pretence of preventing several Appeals; the Master finding his freight lodged so that he could not have it till the Cause was heard in the highest Court, which was not like to be in some Years time, comes away without any other freight or relating there for his Principals Account, which he could not help for want of the Money for his freight; then Horsman sues Newland on the Charter-party for his freight here; Newland exhibits his Bill in Chancery to stop the proceedings here, tho' the Suit was only to recover Damages, and not for the Penalty. The great debate was whether the proceedings at Barcelona being judicial, and began there by Ford Master of the Ship, and Sentence there obtain'd by him should conclude and bar the Defendant, he having caused Money to be brought into Court there, not as excluding the Jurisdiction of this Court by the Sentence there, but that the Court should have regard to the Sentence, and insisted that Newland acted here for Dalmacie, and that Dalmacie was the principal factor, and not himself, and in Case there should be a Recovery against Newland he was without any Remedy against Dalmacie, which last matter seem-

seemed to stick with the Chancellor; whereto the Council for Horselman offered that Horselman did consent that Dalmasie might take out his Money again at Barcelona, and to make any Instrument for that purpose; and they denied that Dalmasie was the principal Merchant, for had it been declared to Horselman that Dalmasie was the principal Merchant, and must have sought Remedy against him, Horselman would never have let his Ship to Dalmasie being a Stranger to him, and thete is no probability that he would let his Ship to Freight to one that he had never heard of, nor had any thing to do with; and insisted further, that tho' Dalmasie were the principal Master, and Newland his Agent, yet that will not concern Horselman, unless Horselman or his Agent had Notice of it, which they never had. And tho' Ford sued Dalmasie in Barcelona, that may not prejudice Horselman nor Ford, because he could not otherwise do, for by the Course of Merchants, the Receiver of the Merchandize is to pay Freight upon the Receipt of the Goods. It was not possible for him to recover the Money any other way, or against any other Person, Newland being in England, and Horselman had instant Necessity for the Money to relade the Ship back again, so the Suit was not a matter of Election but Necessity.

The Lord Chancellor. If the Cause had been fully determined at Barcelona, then—but the Cause is not fully determined at Barcelona for the Damages are not fully ascertained. In Conclusion, he ordered that Horselman should proceed to a Tryal against Newland upon his Covenants, and therein give in Evidence the Non-payment of his Freight, and what Damages he had thereby, and that Newland might give in Evidence of the mitigation of the Damage, and delivered no Opinion how far or whether Dalmasie was the Principal Merchant or not, but would consider that when satisfied in that other Point. Thereupon the Plaintiffs Council prayed a Commission to Barcelona to examine to that Point, which was opposed by the Defendants Council, being publication was past and nothing proved in the Cause of it.

Foreign Judgments.

Commissioner to examine after hearing old new Matters started at the hearing.

Churchil. This Objection is raised by the Court; and arose upon the Debate, and was not in Issue before, and is to be tryed by Letters Resident in that Place, as well as here.

By the Post.

Chancellor. Take a Commission, and examine to it, if you will consent to go to Cypal next Term, and return the Commission before the Term, and go to Cypal, whether the Commission be returned or no. To which the Plaintiff and his Council assented; but moved first, that the Defendant might name Commissioners that the Plaintiff may not be delayed for want thereof. Secondly, That the Return of the Commission might be by the Post and not in the usual way may be allowed; and therefore the Lord Chancellor directed that the Commission should be delivered to Mr. Herne to send the same by the Post to Barselona, and when Executed to receive the same back.

Company of Stationers Case. 28 Nov. 1681.

Printing.
Injunction before Answer

THE King granted to the Company of Stationers the Printing and Binding of Statute Books. The Defendant caused the Statutes to be Printed in Amsterdam, and in great Bails and Quantities to be imported to sell where they remained. The Plaintiffs exhibited a Bill complaining of it. The Defendants appeared, but the time of Answer was not expired till the 1st. of October; I moved that the Books might remain at the Custom-house till Answer. On Debate,

Statute Books.

The Lord Chancellor ordered an Injunction to stay the Books there, not only till Answer, but in perpetuum; for the printing of the Laws was matter of State, and concerned the State. But for other Books, viz. The whole Duty of Man, and other like Books being imported and sold, he left them to the ordinary Course.

Taulurier *contra* Ward. 19 December 1681.Where one of
two must lose,
he loseth that
trusteth most.
Loss.
Fraud.

TAULURIER had a Decree in Chancery for 600 l. which was to be placed out on Security in the Names of Markfield a Clerk in Court and of Buchannon; Markfield would not intermeddle, Buchannon received the 600 l. and the 3d of December lent it to Sir Richard Dutton, who entred into a Statute of 1200 l. to Buchannon for the payment. Taulurier was present at the lending. Afterward Buchannon, who was usually employed by Ward the Defendant

in lending out her Money, told her that a Friend of his had occasion to borrow 600 l. but would not be known to any but to Buchannon, nor give Security to any but to him; but he (viz. Buchannon) would assign the Statute to her, &c. Whereupon the 29th of December she took an Assignment by Deed from Buchannon of the Statute, and the Statute which remained in Buchannon's Hands was delivered to Ward, and she paid the 600 l. to Buchannon, who pretended he dealt for Sir Richard Dutton: After Buchannon died intestate, Taulurier obtained Letters of Administration of Buchannon quoad the Statute; Ward had the Statute; Taulurier could not sue the Statute at Law, because she had it not to shew, and Ward could not sue the Statute, because she was not Administratrix.

Now Taulurier sues Ward in Chancery, one of them must be cozened, and the Question was who should be the loser.

Mr. Solicitor pro Quer. We have Equity, we paid 600 l. we have the Title in Law by the Letters of Administration. Dangerous to take Security from a Trustee without Enquiry.

But e contra, It was objected for the Defendant. Ward is not Plaintiff, but Defendant; she demands not any thing from the Court; by the Grant of Buchannon we have at least property in the Wax and Parchment; the Question is whether the Court shall take that from us, who have without any Fraud lent really our Money. Besides, Taulurier trusted Buchannon with the Statute, and Buchannon deceived her; and the usual practices of the Court is, If a Creditor trust the Scrivener with the Custody of his Bond or Security, and the Scrivener receive and mispend the Money, the Creditor shall not recover against the Debtor, for it was his fault or neglect to trust the Scrivener.

Resp. pro Quer. If the Debtor takes not up the Security when he pays, &c. and the Creditor obtains the Bond, and so hath remedy at Law, there the Debtor trusts the Scrivener.

Winnington. The Statute is dated the 3d of December, Ward lent not her Money till the 29th of December, and she never spake with Dutton, which was a great neglect in her and a folly; if she had enquired of him, he must have warned her, and how could she lend the 29th of December, a Security the 3d of December?

Rawlinson. The Treaty with Ward was in the beginning of December, and the Security was preparing that while, till the 29th of December.

Chancellor. Do you prove the day when you first treated.

Rawlinson. We prove it about the beginning of December.

Chancellor. Ward ought to have enquired of Dutton. Is there any Appeal brought from your granting the Administration?

Respons. No.

The Chancellor decreed for Taulurier.

Sir Francis North Plaintiff, Champernoon and others, Defendants. 17 Decemb. 1681.

32 Car. 2.
Cestuy que
Trust in Tail
suffers a Reco-
very, the Re-
mainders are
barred.

SIR Francis North purchased Lands in Essex, the Fee of some part of the Lands were in Trustees, but the Trust was after Debts paid to Richard Allington in tail with other Remainders over; Richard Allington the Cestuy que Trust in tail suffered a Common Recovery with double Voucher to bar the Remainders over limited by way of trust, but no legal Tenant to the Præcipe, for the Freehold was in the Trustees who were no Parties to the Recovery. And the great Question was, Whether the Recovery did bar the Remainder in trust, for the Plaintiffs Title was under that Recovery:

The Decree is in these words: His Lordship upon long debate of the matter on hearing what was alledged by the Council on either side touching the same, declared, That he was fully satisfied that the said Recovery did sufficiently bar all Remainders depending upon the Estate tail of Richard Allington, who suffered the same, it being a general Rule, that any legal Conveyance or Assurance by a Cestuy que Trust shall have the same effect and operation upon the trust, as it should have had upon the Estate in Law in case the Trustees had executed their trust, otherwise Trustees, by refusing or not being capable to execute their trust, might hinder the Tenant in tail of that liberty to dispose of his Estate and bar the Remainders, which the Law gives him as incident to his Estate, which would be manifestly inconvenient, and tend to the introducing of Perpetuities, and doth therefore think fit, and so

so order and decree that the said Defendants Arthur Champ-
pernoon, Alice Champpernoon, and Elizabeth Way, in pur-
suance of certain Articles executed by them to the Plain-
tiff for purchase of the Mannor and Rectory, and Advow-
son of the Church of Harlow, &c. in the County of Essex,
do forthwith make a Conveyance of the said Mannor and
Premises to the Plaintiff and his Heirs, and that the
Defendants Anthony Cozen and Elizabeth his Wife, (who
is Daughter and Heir of the surviving Trustee) in whom
the Estate in Law of the Premises resteth, and the Defen-
dants Humphrey Williams and Dorothy his Wife, and
Thomas Dorston Senior, and Bridget his Wife, who are
the Heirs at Law of the several Testators, and are to re-
ceive Legacies upon the said Sale, and all other Parties
concerned do join therein. And it is also further ordered
and decreed, that the Lord North do pay the Debts and Le-
gacies, &c. some being Infants, and their Legacies were
to be paid to their Parents on their own Security, which
was to be allowed by a Master, and thereon the Plaintiff to
be discharged of it.

If a Commissioner in a Cause be himself to be exami-
ned as a Witness, he must be first examined; and if others
be before him examined in his presence, he cannot be after-
wards examined, having heard the former Examinations:
And for that Cause the 17th of December 1681. a Com-
missioner who had so done, came up afterwards, and was
examined in Court. His Deposition was suppressed ex
motive Dr. Hutchins.

Anonymus.

An Account referred.

THE Master examined one Witness Three times to Witness.
the Matter of Account.

Examination.

Ordered, The Depositions be suppressed.

Exton

Exton, &c. *contra* Turner. 17 Decemb. 1681.

Witness.
Reviver.

THE Plaintiff Cornelius Burton and several other Creditors of John St. John, sued Martha Turner, the Defendant intestate, examined Witnesses, and the Cause heard. The main question at the hearing was whether the Defendant at the time of his Purchase of the Mannor of Sapcot, had notice of the Plaintiffs Title? And that point being directed to a Trial, a Verdict pass for the Plaintiff. But Complaint was made to the Court, that the Plaintiff at the Rolls, after the hearing, got an Order *ex parte*, to strike out the name of Cornelius Burton; and that being done, said Cornelius Burton was used as a Witness at the Trial, which surprized the Defendant, and the Court set aside that Trial, and Cornelius Burton again made Plaintiff afterwards. The Bill abated by the death of Martha Turner, and the Defendant Turner is her Administrator. Exton and some of the other former Plaintiffs, without Burton and two others, formerly Plaintiffs, exhibit the new Bill to revive the former Suit. To which the Defendant pleaded the Order, that Burton should be Plaintiff, and that a Reviver of the former Bill makes Burton Party to the Suit; and this is an Act by leaving him out now, to make him by a trick to be a witness, and the Suit cannot be revived in part, but the whole Proceedings, viz. Bill, Answer, &c. and all Orders must stand revived, which the Plaintiffs Counsel did agree. A second point was, The Bill was an original Bill, for having set forth the Premises, and the direction to try notice or not, they now alledge that Burton had released his Interest to the Plaintiffs and their Trustees, and that they had several material Witnesses aged and infirm, who may die before the Trial, and pray Answer, and that they may examine their witnesses. The Defendant also demurred to this part of the Bill, and was over-ruled to answer within a week, or to pay Costs.

Nota, Where divers are Plaintiffs, and the Bill after hearing abates, some of them without the rest may revive the Cause.

Examination

2d. Examination after Publication and hearing in a Bill of Revivor, in the new Cause; yet it was declared and agreed by Sir John Churchil, &c. of Councel with the Plaintiffs, that such Depositions could not be read in this Court, but the Cause being abated by Act of God, viz. the death of the Defendant, it's proper to examine Witnesses in order to the Trial, which the Court hath already in the former Cause directed; and those Plaintiffs who now are not Plaintiffs to revive the Cause, have released, and the Examination of Witnesses is only to use them at the Trial, not here. Quare, How it shall judicially appear to the Court that there are such Releases; and Quare how Burton's, or any others who cannot be read in this Court, nor could not have been read if examined, shall be made use of in trial of an Issue being merely matter of Equity, as notice of a Trust, &c.

D E

Term. Sanct. Hill.

Anno Regis 33 & 34 Car. II.

In

CANCELLARIA.

Harvey *contra* Harvey. 18 January 1681.Examination.
Contempt.

SIR Thomas Harvey the Plaintiff had a Decree against the Defendant, for the Surplus of the Estate of Sir John Harvey as Residuary Legatee: The Process to discover the Estate went so far as a Sequestration, and Sir Thomas Hanmer was prosecuted on contempt, for that the House wherein the Testator's Goods were, being secured, and the Trunks by former Order locked and sealed, Affidavit was made that a Smith in disguise on Friday broke open the House, that then the Chests, &c. were opened, and carried away, and Goods, &c. and that Sir Thomas Hanmer was then there with others, and he being now prosecuted for the contempt, was ordered to be examined on debate.

Conyers *contra* Hamond. 7 February 1681.Place sold and
lost, the Money
restored.

THE Defendant sold a Commissioner's Place in the King's Troops for 400 l. to the Plaintiff, who after he had enjoyed the Place three years, was turned out, and another put in his room; and as the Bill supposed, by the Defendant's means or procurement, without any fault of the Plaintiff, which was not proved, it was insisted on by the Defendant's Council.

1. This

1st. This is not a Cause proper for the Court to relieve : A Contract of this nature being a Bargain for a Place or Office of publick Trust and Concern, viz. to take Musters, &c. and though being concerned in Military Affairs, is out of the Statute, yet the King may be abused, and false Musters allowed.

2dly. He was displaced by the Commissioners of the Treasury.

3dly. Had enjoyed the Place and Salary 5 s. per diem, and made other Advantages : And the Cause had been heard before the King at Council-table, and no relief given him.

Lord Chancellor. I wish a Law were that such Bargains might not be, they occasion deceit to the King, &c. but seeing the King hath not disallowed them, the Plaintiff shall not lose his Money, and therefore what the Defendant hath received, he shall repay.

Churchill in the debate took a Difference between this Bargain, for a Place subject to such Contingencies, where the Party may be removed at pleasure, and a Bargain of Land on a Defeasible Title : Ad quod non fuit respons, but decreed it ut supra.

Perrie *contra* Roberts. 11 February 1681.

A was indebted to B. by Bond, and C. bound as Surety for A. and A. was likewise indebted to B. by Contract in other Money. A. and B. came to account of both Debts, and stated in toto to be 84 l. A. after in satisfaction of his debt, makes over certain Goods of less value ; but there was no Declaration, whether the Sale or Money for the Goods was to be in part of one debt or other, but generally. C. the Surety would have it paid on the Bond, and thereby to discharge him. B. the Creditor would take and make use of it as in satisfaction of the Contract debt ; for A. was insolvent, and so else he might lose his debt ; and rather than so, he should apply the general payment to what debt he pleased, viz. to the satisfaction of the debt by Contract, for which he had no other Security ; or else A. being now grown insolvent, he must lose it ; and it were hard when he hath a just debt in Law and Equity to be expounded

pounded out of his debt by Interpretation of a payment generally made.

Solicitor Finch. The Sale was a further Security for both debts, and so for his Bond debt he hath two Securities, the Sale and the Bond; and he who hath two Securities may help himself upon either.

Lord Chancellor. If there had been two debts, and a Sum of Money be generally paid, the Creditor may elect and choose after to what debt to apply it when on payment the Debtor made no distinction how he paid it; but this payment being pursuant on a precedent Account of both debts, the payment shall be intended according to the Account, viz. on both debts, and so shall be proportioned ratably on both debts.

The Master of the Rolls had so ordered before, and his Order being now disputed, was confirmed on re-hearing, and the Surety pro rata discharged.

Anonymus. 18 February 1681.

No discovery of
Witnesses.

Motion was made that the Defendant might discover the Names of the Witnesses to a Deed; by which the Defendant claimed by his Answer, which the Plaintiff by Bill charged to be antedated; but the Antedating denied by Answer.

Lord Chancellor. That may tend to prepare or otherwise to tamper with the Witnesses, and therefore denied the Motion; but if there were apparent Suspicion, it may be.

Popley *contra* Popley. 20 February 1681.

Alienee eased by
the Executor.

Debt in Equity.

Decided by the Lord Chancellor, That not only the Heir in case he be charged with debts of the Ancestor; but a Devisee of the Land shall be unburthened too of a debt lying on the Land by the personal Estate in the hands of an Executor or Administrator, and so shall a Devisee of a Mortgage. In the principal Case the question was, whether a Sum of Money were a debt, or duty in Law or Equity, and being a Charge in Equity, a Decree was that it shall be paid out of the personal Estate, and lessen the Widows customary Dower in the Province of York:

If

If it were a debt in Law or Equity, then it should come in and be deducted in the first place, and lessen the Widows Dower; and being here a duty in Equity, it was so decreed: But a Legacy could not be so deducted.

Howell *contra* Waldron. 24 February.

Legatæ Infant sueth in a Court Ecclesiastical, and *Lis pendens.*
pending that Suit, sueth in Chancery: The former Court Ecclesia-
stical.
Suit depending being pleaded, the Plea was disallowed, for
there's no such Security as for the Infant's advantage as
here, and possibly not for Interest if placed out, and for
bringing in account here, &c.

D E

Termino Paschæ

Anno Regis 34 Car. II.

In

CANCELLARIA.

Anonymus. 26 April 1682.

VV Illiam Bullock posselt of a Lease for 1000 Years, on a Creaty of Marriage between him and Sir John Knight, to be had between Henry Son of William, and Bridget Daughter of Sir John Knight, assigns the Lease to Sir John, &c. on trust; first, William to receive the Profits till the Marriage, then Henry to receive the Profits so long as he shall live, and no longer; then after his death Bridget to receive the Profits during her life, and no longer; and afterward the Issue of the said Henry and Bridget, between them to receive the Profits so long as any Issue of their Bodies shall continue, with Remainder over. The Marriage is had, Issue born, Henry assigns all his Interest to his Father, the Issue dieth, Bridget dieth, William takes Administration of Henry, Sir John Knight takes Administration of Bridget and the Issue. The question is quid Juris on a Bill exhibited by William and Sir John Knight, Trustee and Administrator of Bridget, and the Issue?

On debate the Lord Chancellor ordered the Assignment to be brought to him, (for some Differences was alledged to be in the words of it) and when he had perused it, he would declare his Opinion.

1. The main question was, whether as this Case is, the Issue were a Purchasor, or whether it were in the nature of a Limitation.

2. If

2. If the Assignment being ut supra, pass away the Interest of the Wife, if it were a limitation, 1st. In regard of the Coverture, viz. the future Interest and Possibility (for it being made for her Preferment in nature of a Jointure, it was agreed it could not hurt her during her Life.) But 2dly. whether this Possibility were grantable.

The following Case cited by the Lord Chancellor in a Cause of Bradburne contra Amand.

THE Lord Dacres employed Crompe to purchase Land for him, and to take up Money to pay for it, which Crompe did, and took the Purchase in his own Name; the Lord Dacres sued Crompe in Chancery, to have the Lands on payment of the Moneys, but Crompe on other occasions had Mortgaged, Engaged for, and on behalf of the Lord Dacres, and insisted for them also. And the Lord Dacres could not have a Decree, but must pay the one Moneys as well as the other by Decree of the Lord Bridgman. Pay all or none.

Hele contra Hele. 28 April 1682.

THE Bill was by the Plaintiff, Widow of Sir Henry Hele, to have a Jointure of 300 l. per Annum settled on her, and the main Questions on the Case were two, viz. Sir Thomas Hele had Three Sons, Thomas, Samuel, and Henry the Plaintiffs Husband, and a Brother Richard, Father of the Defendant Richard Hele. The Estate was so settled, that Henry Hele the Plaintiffs Husband was seized in Fee simple of some Lands, and of Lands in Somersetshire which were his own Inheritance; and on Treaty with Mr. Elliott Father of the Plaintiff, for a Marriage between him and Jane the Plaintiff Daughter of Elliott, it was agreed the Marriage, &c. and near 3000 l. Portion; 1900 l. of the Portion was paid, and the rest secured, and Mr. Elliott took a Bond of 6000 l. to himself in trust for the Plaintiff. The Condition was in effect to settle on Jane 300 l. per Annum of Lands, in the County of Devonshire, Cornwall and Somersetshire, of the value of 300 l. per Annum, but no particular Lands expressed; Samuel the elder Brother of Henry, had by his Will settled divers Lands on Trustees (Defendants also) and gave power to Henry to make a Jointure to such Wife as he should Jointure.
Marriage.

should Harry of the Barton of Fleet Damaroll, (but he was Tenant in tail of all) that Barton (except the Capital Messuage and some Lands parcel thereof value 50 l. per Annum) was entailed, so that Henry who inherited that Intail, had only such Power on the Capital Messuage and those excepted Lands.

Henry makes his Will, and devises all the Lands which he had to Richard the Defendant in Tail, and dieth without Issue, the Lands which Richard hath by the Will, &c. are of great Annual value. But the Plaintiffs Portion 3000 l. paid, and no Jointure made, for which she now sueth; and two Objections (intra alia not so considerable) were made against her, viz.

1st. Tho' it be charged in the Bill that there was an Agreement precedent to the Bond, that 300 l. in Lands should be settled in Jointure, and after Bond, &c. to settle it is particularly denyed by the Answer and insisted, and no Proof made of it, and therefore the Obligor had Election to pay, or settle and avoid payment by Settlement, and by chance might so declare, viz. that he would not be bound to settle, but would be at Liberty and we are content, the Plaintiff take advantage of the Penalty, but are not to be forced to the one, if content to submit to the Penalty. Henry Hele could have no more imposed, a fortiori, nor the Defendant.

Resp. 1. The Bond is but a Security for the Jointure to be made, and of Necessity supposeth a precedent Agreement that such a Jointure should be made: First, it is agreed what shall be done: In the second place, the Treaty and Agreement is, how that which is agreed on shall be secured, and in such Case the Security commonly is penal, but the penalty can never be demanded in Equity, the Party performing that, for non-doing whereof the Security or Penalty is given.

2. It is unreasonable that the Obligor should be at Liberty never to perform the thing secured, and the Person secured, not able to ask the Penalty as indeed he can never demand it in Equity. If the Obligor should sue in Equity on the loss of his Bond to have the Penalty, it would be Pain, and if he in Equity ask in the Disjunctive, that he might either have the Penalty, the 6000 l. or the Jointure

(sup.

(supposing the Lands were in truth certain) Chancery might decree the Jointure, but would never decree the Penalty, tho' the Chancery would perhaps impose some other reasonable Penalty on Non-obedience, but certainly never decree the 6000 l. unless the true value on Disobedience amounted to as much.

3. And it is not Reasonable nor Equity, that in Case of a Marriage Agreement, and the Portion paid, that strictness of Law should hold on one side, and the Benefit to avoid it too, and the other side have no liberty; but if he should attempt to have the advantage in Law of the Penalty, to be stopt in Equity when the other Party would, and yet if he would be content with Equity, not to be suffered to ask it tho' it be due.

4thly. The Case is the same in Equity, if the Condition had been to have had certain Lands for Jointure, as when it is general; I say the same as to this Objection.

Therefore the principal scope of the Parties being for a Jointure, and the clear Deconomy (pardon the Expression) of the whole Agreement being that, without all doubt the one or the other ought to be had, viz. the Jointure or the Penalty. If things be brought to that pass that one of the two is become impossible (that is, unpracticable, or as Circumstances of the particular Case are, not accomplishable) then that part of the Agreement which is feasible shall be performed.

Especially if it fall out to be in such state or Condition, by the Act, Fault or Negligence of the Party who had once Election to do otherwise; for such Act or Neglect determines the Parties Election at Common Law, and in Reason and common Justice; yea, tho' it fall out by the Act of God or of a Stranger, and without the Parties fault; wherein I hold the Differences to be two; First, between an Agreement or Covenant to do in the Disjunctive one thing of two, and where there is a penal Agreement to do one thing of two, as if I covenant to enfeof a Man, or make a Jointure in possession of B. or W. and one of them is carryed away by inevitable inundation or the like, yet I must do the other.

This is at Law where no Remedy is given but for the Penalty: But in that Case, if the Agreement were without Penalty, and the Penalty for Security, and to be reasonably intended so to be, there tho' an Impossibility

of one happen by the Act of God, the Chancery will pass by the penal and formal part, and insist on that which was the principal thing secured by the Penalty: If the Penalty were the Principal, it were demandable in Equity.

Now in this particular Case as the Circumstances of it fall out, Henry Hele who was to make the Jointure, is fallen into a Condition as that he cannot perform the one part, viz. the Penalty; for it is agreed that his Debts exceed his Personal Estate, and his Land he hath debilitated away, so that he cannot morally considered, pay the 6000 l. because there is nothing left; the thing cannot be done by him, so he hath no Election to do it being in that Condition.

Object. 2. The second Objection is of more weight, viz. the Covenant is general, not to settle Black-Acre of 300 l. value per Annum, but only to settle 300 l. per Annum in Lands, so as Henry Hele might settle any Lands in those Counties, and the Chancery could never with Justice compel him to settle this or that Land, if he would settle 300 l. per Annum any where within those Counties.

I agree it so, as long as he could any way perform and settle 300 l. per Annum, but if he be once reduced to such Condition and Circumstances as that he could not possibly perform, and such Impotency appear to the Court Judicially, the Court may Chuse for him and enforce him to a particular, as if the time of Settlement were past, and he aged or the like, the Court may apply the general on his particular Lands, as if he were an Anthrift, &c.

Object. 3. But here the Land is in Richard the Defendant as a Purchaser, not as Heir, for he comes to the Land by the Will of Henry Hele, not as Heir to him: Tho' Henry was bound, and his Heir would have been bound had the Lands descended to him as Heir; Yet also in that Case, if Richard had aliened the Land before Debt brought on the Bond, the Heir of Henry the Obligor should not have been bound, and by no Rule of Law or President of the Court is an Assignee of Land bound by a Personal Covenant, and the Court will not make new Presidents.

Resp.

Resp. The strength of this Objection lyeth in this, viz. That the Agreement is not to settle any Lands in particular, as Black Acre, but generally any Lands in Devonshire, Cornwall, &c. So as it is true, no Lands of Henry were tyed by this Agreement, and therefore how can any of them be bound in the Hands of his Devisee?

Examine why is Henry and his Devisee bound, in Case the Agreement had been of Lands in particular, and Richard Devisee of them. It is clear, Richard should have been bound in that Case, and so should a Purchaser of them if he had Notice; yet in that Case the Land is not bound by the particular Covenant, no more than if it were general, else every Alien tho' for a valuable Consideration and without Notice, should be bound but are not.

So that the particular Covenant doth bind the Covenantor in Conscience, and the Covenant general doth bind him as well and as much.

This Case is now reduced to that plight, that Henry who made this general Covenant had no means possibly to perform the general at the time when he made the Devise of the Lands now in Question, but out of these Lands, for he had no Personal Estate, either to satisfy in Money, or to procure or purchase other Lands of the value. He makes his Will, he is on his Death-bed, shall the Court imagine that he being obliged on so great Consideration of 3000 l. received by him in Moneys, and Security for the rest, and having no other means possible but by those Lands to perform his Covenant, and that to his Wife whom he had lately married, and never offended him, to give his Lands to a Brother's Son, and break his Bond and Conscience, and ruin and beggar such a Wife?

I say, that being he had no other means but by these Lands to perform his Covenant, the Court shall do what in Conscience he ought to have done, and lay Hands on these Lands, seeing that there is left no other possibility.

Had Henry Hele been alive, he should be decreed in such Circumstance to settle these Lands, viz. 300 l. per Annum out of them; as the Court if he had been brought to a hearing, would not have given him time to purchase other

Lands, so the Court at least would lay hold on these, if in convenient Time or during Life he did not, which differs a Devisee from the Heir; had he left them to Richard who was his Heir he had been bound, he leaves them by his Will to him, it is the same in effect.

Object. The Common Law binds not the Devisee, and it is a breach of Law to bind the Alienee, and there is no President, it will be a new one.

Resp. Is it not against Law, or to say better, is it not more than the Common Law can do, to decree it, if the Agreement were for particular Lands? And yet at this day there would be no scruple in that Case: The Objection of the Law is as strong in the one Case as the other; in both the same.

4 & 5 M. There the Covenant was by Indenture to settle divers Lands (per nosme:) It is there resolved, not only that the Estate was not settled in Law, but also Cui nul Subpoena voile giser pur luy come pur Cestuy que use de compeller l'Estate d'estre execute quia party ad Election al Common Ley per action de Covenant, In that and this Case.

Observ. 1. No difference where the Covenant is by Name and where generally at the Common Law.

2. That surely 4 M. there was no President then where the Agreement was per nosme.

3. That yet it is indubitable at this day to decree of particular.

4. That therefore when 'twas first done after 5 Mary, the Court did not forbear to decree, tho' no President.

5. Nay, yet the Court hath gone further to the Heir than to the Assignee, tho' a purchaser on valuable Consideration if he had Notice, and it is no defence for him to say that the Covenantor had Election to sue by Covenant at Common Law.

It is harder on the Plaintiff, for she hath no Remedy: Indeed she may sue but to no purpose, for Richard the Devisee and Executor tells us and your Lordship by his Answer, viz. that he hath no Assets.

The

The Common Law relieves not particular Cases against the general Rule, but in Chancery every particular Case stands on its own particular Circumstances; and tho' in general the Law will not relieve, yet Equity doth, so as the Example introduce not a general Mischiefe.

Common Law relieves not against a general Rule, but Chancery does.

Here is a Cause of as great Equity, of as good Consideration (Marriage and Portions) as can be, as singular in Circumstance, where the whole Estate the Defendant hath comes to him by meer Liberality. 1. The Liberality of him who was not pro arbitrio, to make the Jointure, but ex justitiæ merito.

This Case is not like to be a President.

Company of Stationers, 29 April. Ante.

THE King granted the sole Printing of English Bibles and Statute-Books to the Plaintiff: The Defendant traded with certain Dutchmen, who printed many thousands of them in Holland, and the same were now in the Custom-house; and formerly on a Bill exhibited in Chancery, the Plaintiff had an Injunction against the Defendant not to import or vend the same Books, in regard it was not only a breach of the King's Prerogative, but of great and publick consequence for Strangers to print and vend in England our Statutes and Laws, if falsly done. And now I moved for Explanation of the Order, &c. and Injunction; for the Defendant had acknowledged Judgment, or Judgments were obtained against him, and also a Commission of Bankrupt was prosecuting, and there was pretence that those who came in by such Judgment or Commission, should not be bound by the Injunction.

Injunction.
Prerogative.
Statute.

The Lord Chancellor declared they should be bound; and further ordered, that in regard divers of the Books were in the hands of the Customers, the Customers should suffer none of them to be removed thence: And that they first acquaint the Court, and an Injunction granted accordingly.

Row *contra* Tilleir.

Portion.

Condition.

THE Father seised in Fee of Copyhold Lands, surrendered them by the hands of two Tenants, viz. J. S. and his own Brother Tillier Father of the Defendant, and now dead, to the use of his Brother Tillier and his Heirs, on condition that Tillier paid to Katharine, the only Child of the Survivor when she comes to the age of Twenty one, 200 l. Provided if his Daughter died without Heirs of her body, then Tillier the Brother should have the 200 l. The Father Survivor died, leaving his Daughter an Infant not two years old. The Daughter at 18 years married the Plaintiff, and had Issue George, and died when she was 20 years and an half. The Son died an Infant; the Plaintiff, Husband of Katherine, the Daughter, and Father of the Child, takes Administration to them both, and sueth the Son and Heir of the Cestuy a que; the Surrender was made for the 200 l. who insists that the Money is not due, because the Daughter never came to Twenty one, according to the Condition. Pasch. 1682. the 200 l. decreed to the Plaintiff.

The Father gave his personal Estate of good value to his said Brother, but nothing else of his own to his said only Child.

Harding *contra* Edge. 13 May.

Charitable Uses.
Decree.
Alience.

A Decree was made by Commissioners on the Statute of 43 Eliz. for Charity, against Harding; who took Exception against it in Chancery, and then being seised of Lands, conveyed them to raise Portions for his Children after the Commissioners Decree was confirmed in Chancery, the Conveyance was with power of Revocation: This shall not hinder Execution for the Money decreed, but the Lands aliened shall be sequestred for the Money, and a Scire facias against Harding's Heir; for the Exceptant died after the Decree confirmed; the Conveyance was mean between the two Decrees.

Brooks

Brooks *contra* Bradley. 11 May 1682.

THE Bill was to have a discovery of Gold, and a great quantity of Goods which the Defendant took out of the Plaintiffs Ship; which Goods and Ship the Defendant took on the Sea.

The Defendant sets forth, The Charter made by the King to the African-Company of the sole Trade in those Parts on the Guinney-Coast, and empowering them to seize the Ships and Goods of any that should trade in those Parts; and justified under the Patent what he did, and denied to make any discovery.

The Plaintiffs Counsel offering to waive the Plea, and demur:er:

Lord Chancellor. If you can help your selves at Law do so, but I will give you no assistance to discover here in prejudice of the King's Charter.

Pamplin *contra* Green. 11 May 1682.

THE Bill is against an Administrator and other Persons, to have Distribution of the Intestates Estate, according to the late Statute; which Statute the Defendant pleaded, and that by that Statute the Ordinary is made the Judge to distribute, and is appointed to take Security: And therefore the Plaintiff ought to sue there, and not here.

The Lord Chancellor over-ruled the Plea, and order'd that the Defendant's should Answer.

Sir Charles Lee & Uxor, *contra* Sir John Boles, Administrator to his deceased Wife. 1682.

THE Defendant had Verdict and Judgment against the now Plaintiffs, who now after the Judgment sought to be relieved against the Judgment, and the Case on hearing was, viz. The said Sir John Boles became a Tutor to the Plaintiffs Daughter, who was informed that his Estate in Lands was 1700 l. per Annum, and free from

from all Incumbrances, except 7000 l. for a Daughter's Portion, to his Daughter by a former Wife, then sick. The Mother the Lady Lee informed him that her Daughter's Portion, left her by her father deceased, was 2000 l. but she would add 2000 l. more, and so pay the said Bolls 4000 l. and would give her Daughter 1000 l. more, and 60 l. per Annum for two years, if his Estate was such; and Articles were mutually executed, by which it was in the head, and other places of the Articles, recited and expressed that the Daughter's Portion was 4000 l. but there was a distinct Article, that if no Act were done or suffered before the first of November 1668. whereby the Heir Male of Sir John Boles by the Plaintiff's Daughter, might be hindered from enjoying the Lands by the Articles agreed to be settled on them, then the Mother would pay to Sir Vincent Corbet and Robert Corbet, 1000 l. and 60 l. per Annum, for two years for the sole and proper use of her Daughter, and Sir John Boles not to meddle with it: There were other Articles for Jointure, &c. and Settlement on the Heirs Males; but the Lady finding that the Lands were incumbered, would not suffer the Marriage to proceed. Thereupon Boles and the young Daughter agreed with the Mother to release the 1000 l. and did make a full Release and Discharge thereof, referring to the Articles touching the payment thereof: But this though in writing, and subscribed by Sir John Boles and the Daughter, was not sealed; the Daughter was of full age; the Marriage was had, but the Lands were incumbered, 2000 l. of the Portion being unpaid, a Suit was in Chancery; which by Mediation of the Court was composed, the 2000 l. paid, Lands of 1200 l. per Annum settled, and so all things quiet: But the Wife being dead, Sir John Boles takes Administration, and sues Sir Charles Lee and his Lady for the 1000 l. in an Action of Covenant, whereon the said Release (not being under Seal) could not be pleaded; but the 1000 l. not being payable by the Articles unless the Land was free, ut supra; and finding a Mortgage made by the Father of Sir John Boles that incumbered the Lands, and that Sir John Boles always received the Profits thereof, which gave occasion to the Plaintiff's Heir to believe those Lands to be Sir John Boles's, and they by way of bar to the Covenant; that matter was pleaded, viz. that those Lands were incumbered, and shewed how: But it being insisted then that the said Lands were not the Lands of Sir

Verdict.
Mistake.

Sir John Boles in Law or Equity, the Mortgage being unsatisfied, for they were the Mortgagee's Lands in Law and Equity till he was paid, and so the Article in generality comprehended not those Lands.

The Verdict past for the then Plaintiff, and the Note was given in evidence to the Jury in mitigation of Damages: Therefore the Defendant insisted, that after Verdict and Judgment in an Action of Covenant, where Indamages are only recovered, the Suit is not to be allowed in this Court.

1st. For the now Plaintiff it was pressed, that this 1000 l. was a voluntary Gift and Liberality of the Mother, and given and covenanted to be paid only on precedent condition, viz. if no Incumbrance (that might prejudice the Heir Male) were, but now the Lands appeared to be incumbered.

2dly. Though in strictness of Law an Agreement to discharge a Duty created under Hand and Seal, is not good in Law; yet in natural Justice it is all one as to the Conscience of the Parties, where there is no Fraud or Practice, nor Surprise in obtaining it, much more when there is a Consideration or just Reason for it, as here there was, viz. consenting to the proceeding of the Marriage, which was justly stopt by the Lady, being informed of the Incumbrance. And it is adjudged at Law that in consideration the Father or the Mother shall consent to the Marriage of a Child, it is good to raise a Use or Action on the Case.

3dly. The reason why the Law requires a Seal and Solemnity is, that the thing be certi juris, and to prevent surprise, of which here is no doubt. The Defendant confesseth the Fact, though he swears also that he meant not to abide by it, or to that effect, so the Fraud lies on his side; he meant not to do in effect what he did in shew do.

4thly. The Verdict was on a Mistake, whereinto the Plaintiff was led by the Defendant, for he kept possession, and received the Rents, &c. which made the Plaintiff take him for Owner of the Land; and the Plaintiff now, then Defendant, could at Law assign but one breach, viz. one Incumbrance, though there were many, and are now proved; and if any Incumbrance were, he had no title to the 1000 l. and it's no reason that the strictness of the Law

tying the Plaintiff to one breach, should intitle the now Defendant to that to which now it appears he never had title, because there were more Incumbrances, so in truth he never had title.

The Lord Chancellor after long debate dismiss the Bill, principally because the Plaintiff did not come into the Court till after the Verdict and Judgment: And the Chancellor took notice that the Settlement made was more beneficial than the Settlement propounded in the Articles; but that was ordered after the Condition broken, viz. not discharging the Incumbrance Six years after the time when, &c.

Raufon *contra* Sacheverel. 13 May.

Pay all.
Feme Covert.
Mortgage.
Surcharge.

SAcheverel and his Wife leased in Right of the Wife, by Fine and Deed mortgaged them for 340 l. which was not paid at the day, but 200 l. part was paid afterward, and then the Mortgagee had occasion to borrow, and did borrow other Money of the same Mortgagee. The first Money, viz. the payment of the 200 l. was indorsed on the Mortgage-Deed; the Wife in presence of the Husband made account of what was due on the first and second Loan, for both by Agreement were to be on Security of the Mortgage: The Wife died, but no new Fine leyed on the second Loan.

And therefore it is objected, that neither her nor the Husband's consent, shall bind her Heir.

The Lord Chancellor e contra: For the Mortgagee hath good Title in Law, and as much Equity to the Money as the Heir hath to the Land, pour que, &c.

Brond *contra* Brond. 19 May.

Jointress re-
deems, &c. pay-
ing a third part.
Mortgage.
Baron and Feme.
Limitation.

THomas Brond late Husband of the Plaintiff, in consideration of 3000 l. settled, inter alia, Houses in Bread-street, in all of the value of 350 l. per Annum, to the use of himself for life, Remainder to the Plaintiff for life for her Jointure, with Remainder over. The Houses Anno 1666.

1666. were burnt, and the Husband being unable to rebuild them, without borrowing Money, perswaded the Plaintiff to join with him in a Fine sur concessit, for a long Term of years, to secure the Money to be borrowed; and agreed with the Plaintiff that it should be no prejudice to her, but that she should redeem, paying the Interest of the Money borrowed. 600 l. was borrowed of Alderman Jefferies, and a Fine leyed to him for 99 years by the Plaintiff and her Husband. Jefferies redemised the Costs of the burnt Houses to the Husband for 98 years, rendring 36 l. per Annum, and to repay the 600 l. at a time, &c. the Houses are rebuilt by the Husband, who afterwards settles them and other his Lands on himself in tail, to the Heirs Males of his Body, the Remainder in tail to the Defendant his Brother, charged with Portions of 3000 l. to his Daughters, and dieth Anno 1674. and made the Defendant his Executor, being his Brother, his personal Estate but 182 l. short of his debts. The Defendant was bound for him in Bonds to the value of 1600 l. and entred on the Houses, paid the 1600 l. and took up the Bonds, and also paid the Interest of the 600 l. borrowed till 1681. and then the Plaintiff exhibited the Bill to redeem, for that the Houses yeld 180 l. per Annum, and the Rents received by the Defendant were more than the Money borrowed, and her Jointure now left but 200 l. per Annum, besides the Houses; and prays that she may redeem, paying proportionably, and hold over till that she be repaid, with Interest.

E contra, It was alledged, and the truth was that she never question'd the matter in 13 years; during all which time the Defendant paid Interest, and paid the 1600 l. which was the Brother's debt, and the Houses redemised, came to him as Executor of his Brother, and were Assets in his hands; so that in Law the same was liable to pay debts, and in Equity he ought not to be liable to his Brother's debts; and the Plaintiffs Title was but a Parol Agreement between Husband and Wife, and the Defendant never had notice of any such Agreement till this Bill exhibited Anno 1681.

The Plaintiffs Council replied, That when she joined in the Fine with her Husband, the Equity of the Redemption did properly belong to her, and her Husband could not discharge it by any subsequent Act or Agreement be-

pond the Mortgage-money and Interest, unless it were for valuable Considerations to one who had no notice of her Title; but the Defendant is no Purchaser, but comes in only as Executor, and paid no Money for the Lease: Therefore prayed that she might be admitted to redeem from the Mortgagee, that the Profits and Rents which the Defendant had received ultra the Interest might be accounted to her as belonging to her for her Jointure.

The Lord Chancellor after much debate decreed, That she should have the Redemption, paying a third part of the Principal-money, but should have no Profits received by the Defendant, till the Bill exhibited 1681. which was the first time he had notice of the Agreement. And the Plaintiff was to pay the other two parts of the Principal, and the Executrix the Wife to be re-imburshed in case she died, if she paid more than the third part. The Mortgagee was Party to the Bill.

Hammond *contra* Shelly.

Commission to
examine Con-
tempt sworn,
viz. Process
served.

THE Defendant was decreed to pay the Plaintiff 400*l.* and being examined for Non-payment, denied the Service of the Process; and the Parties living in Plymouth; the Plaintiff had a Commission to prove the Contempt, and proved it positively by one Witness. The Defendant prayed a Commission to examine touching the Contempt, alledging to the Court that the truth was, That the Defendant was never served, but sick in her Bed at the time when the Service was pretended to be made; and that her Sister going to the door when he that served the Process knocked, he served her instead of the Defendant.

The Plaintiff much opposed this Commission, but my Lord Chancellor granted the Motion, for it was not known whether it was served, but whether it was mis-served; and said it was no reason she should lose her liberty upon a Mistake of serving Process.

Paget *contra* Paget, &c.

THOMAS LORD Paget deceased, having several Sons, whereof the Plaintiff was one, he by good assurance appointed inter alia, 12000 l. to be for Portions of the younger Sons, the Plaintiffs Proportion thereof came to 2000 l. or thereabout; but he became indebted and had spent 400 l. which he desired one of the Defendants, the now Lord Paget, to pay him out of his Portion, which was in the Defendants hands, and to relieve him he was contented to do, so as out of the rest Provision might be made for his Wife and Children, to be laid out in Lands; for it was feared that he might waste the rest: And Articles were entered into accordingly that the rest should be so laid out; but the Plaintiff being further indebted, he sues to have some further Proportion; for he might better provide for himself and Family if he might be supplied with 500 l. to buy an Office, and 100 l. to pay his debts.

The Lord Paget submitted to the Judgment of the Court, and was willing to pay the Money into Court, or as the Court should order.

The Lord Chancellor propounded often to the Defendants Council, what Sum should be paid. Chancery.
Feme Covert
examined.
Consent, &c.

They said they might not consent: The Articles were that it must be laid out in Land; and the Wife was concerned, and no party to the Bill. The Wife happened to be in Court, and said she desired the Money might be laid out as her Husband had prayed; and being examined by the Lord Chancellor, answered accordingly.

Whereupon the Lord Chancellor decreed that 600 l. should be paid, viz. 100 l. to pay debts, and 500 l. to be laid out to buy an Office, but not to be paid to the Plaintiff himself, but for an Office; and in the mean time the Lord Paget to pay the Interest, for he did offer to pay the whole into Court, or keep it at Interest. And it was further ordered that the Plaintiff should procure the Office within Months.

Quare, If the Office be bought, and the Husband die; quid.

Mildmay

Mildmay contra Mildmay, &c.

Conveyance in
trust by the Hus-
band for his
wife.
Baron & Feme.
Agreement.
Elopement.

THE Plaintiff, Wife to the Defendant, and Coward her Trustee, sue to have performance of an Agreement made under Hand and Seal; by which the Defendant granted to Coward, whose Executor the Plaintiff Coward is, all his Rents of his Mannor of East-Camel in the County of Somerset, Habendum for years, if the Wife lived so long, for the sole use of the Wife; and if the Rents failed by the death of Tenants; whereby the Lands might decay, he would continue payment, and enforced her demand, because the Ecclesiastical Court had given her Alimony, but less than they would have otherwise given her in respect of this Grant; and for further Equity, that the Defendant had bought in some of the Tenants Estates, whereby the Rents could not be recovered at Law.

The Objections were:

1st. That the Grant was after Marriage, and voluntary; for her Portion being 1200 l. she had on Marriage a Jointure of 100 l. per Annum settled; and the Grant in question was made two years after, and the Rent was duly paid till she undutifully eloped from him, as he deposes in his Answer.

2dly. The Case of it self is not a Case for this Court to favour; and to decree for the Wife against the Husband, is to give her power over her Husband, or his Estate, by a voluntary Agreement of the Husband.

The Lord Chancellor decreed that the Plaintiff shall not be barred to sue in her Trustee's name: And that the Surrender or Discharge of the Rent by the Husband, shall not be made use of.

White

White *contra* Small.

DECREE that Conveyances made to the Defendant by Elizabeth Marchant of an Equity of Redemption, be set aside; the Bill being grounded on Weakness and Lunacy of Elizabeth, the Plaintiffs Cousin-german, and Heir to Elizabeth; The Defendant Cousin-german, in the same degree. No proof of Lunacy; but she was weak of Understanding, she could read, and taught a Child to read: Two days after the Deed, she said she had made it to the end the Defendant should have the Land; yet because the former Communication of such Grant was before, and no consideration in the Deed, but fraud—to be prepared and obtruded on Elizabeth. It was set aside by the Lord Chancellor.

Conveyance voluntary made by a Person weak, tho' not Lunatick, avoided.

D E

Term. Sanct. Trin.

Anno Regis 34 Car. II.

In

CANCELLARIA.

*Domina Dacres contra Chall. Chute. 15 June 1682.*Jointure.
Sequestration.

CHall. Chute, Grandfather to the Defendant, and Husband to the Plaintiff, by Deed covenanted to settle on the Plaintiff a Jointure of 500 l. per Annum, or to leave her 5000 l. He failed to make the Jointure, and died: The Plaintiff obtained formerly a Decree for the 5000 l. with damages, against Chall. Chute, Father of the Defendant, who dying, the Bill was revived against the Defendant as Heir to his Father and Grandfather, and against Mr. Barker and Mr. Leonard, his Uncles and Guardians. There was so far proceedings against Chall. Chute the Father, that a Sequestration of the Vine and other Lands was ordered, and Owen and three other Sequestrators were named. The Cause coming to be heard against the Defendants, the Bill being for the 5000 l. damages:

The Counsel for Chall. Chute then Defendant, informed the Court that there were many debts on the Estate; and two younger Sons and a Daughter of the Defendant's Father, that had no maintenance, a Statute of 3000 l. to the Lady Anglesey, acknowledged by the Defendant's Father for payment of 400 l. per Annum, to the Lady Anglesey for her life; and if the Lady Anglesey should lay hold on the personal Estate, the Family would be ruined, the younger Children unprovided for, the debts insuperable,

ble, and therefore the Defendant's Council propounded for remedy that the Plaintiff the Lady Dacres should not lay on the Sequestration on the whole Lands, but suffer the Lady Anglesey to enjoy part; for though her Statute bound the Defendant, (being acknowledged by him) yet it was subsequent to the Plaintiff's demand, grounded on the Grandfather's Covenant, and some other things, and propounded that 40 l. apiece might be paid for the young Children; and after debts paid, and these things done, the Defendant should have the Surplus. Mr. Barker and Leonard, the Guardians of the Defendant, and the Plaintiff not opposing, it is so decreed, and Mr. Owen (which was part of the Proposal) to receive and dispose of all, and 20 l. per Annum Salary to be allowed to him, and accordingly the Court decreed it. The Childrens Maintenance was raised and disposed of by Owen, as well as the other Matters and Payments to the Plaintiff, towards her Satisfaction of her 5000 l. with damages: Owen to take Administration of the personal Estate, and apply the same to the other debts, which he did: And the Maintenances of the three young Children, amounting to 120 l. per Annum, was by Owen paid, some part to the Childrens own hands, and the rest to the Plaintiff for them, who educated them therewith, paid for their Schooling, Clothing, &c. and brought them up very well; and Owen accounted still to Mr. Barker of those and the other payments. Mr. Barker subscribed and allowed the Accounts, and so Matters continued and were transacted for many years, viz. about twelve years.

And then Chall. Chute the Grandchild appealed to the Lords in Parliament against the Decree; and among other points, insisted that he ought not to have been charged with the Maintenance of 40 l. per Annum, to his younger Brothers and Sisters. And as to that point the Lords in Parliament adjudged, that the Clause in the said Decree touching the Maintenance of the young Children, be reversed and annulled; inter alia, they confirm the first Decree made for the Lady's 5000 l. with damages. They order, &c. that the Plaintiff account for what hath been received by her.

Afterwards the Plaintiff exhibits this Bill, for that Chall. Chute the Father had made a Will, which was in Mr. Barker's hand and concealed; wherein he made Barker and Leonard the Uncles, Guardians to all his Children,

den, and his Executors; and as she alledged, he had provided for Maintenance for the younger Children thereby, and therefore she ought not to be charged with the Maintenances; for the Defendant pretended that the Monies received by her from Owen out of his Estate, ought to be charged on her account, and to sink her principal debt, with proportionable damages from time to time: And on this depended the Resolution of an Exception to the Master's Report, who stated the Account as to this matter, especially touching that point.

Now the Will was read as before, but tho' the Uncles were made thereby Guardians and Executors, nothing could be thence enforced to the point of the Maintenances.

The point debated before the Lord Chancellor was, Whether the Plaintiff should be charged with the Money received by her from Owen for the Childrens Maintenance, amounting to 1200 l. which with Interest came to 2000 l. or thereabouts?

The Defendant's Counsel now insisted that she should;

1st. For she was their Grandmother, (which was true, for Chall. Chute their Father married her Daughter their Mother) and therefore she by Law ought to have maintained them.

2dly. It was her Agent that received the Monies, and paid the same to her.

3dly. The Lords Order is express, that she is to account for what she received; but this Maintenance-money was received by her.

The Plaintiffs Counsel answered;

1st. She is not bound to maintain her Grandchildren more than the Defendant is to maintain his Brothers, and no Law binds her to it.

2dly. Owen is not her Agent, but the Agent of the Court, and of the Creditors, and of the Plaintiff: He is appointed Receiver for all Persons, and that by the Court, and this done at the Proposal of the Defendant for his benefit, and to preserve him and his Family; for the Plaintiff suffered prejudice by it, viz. delay in payment of her 5000 l. for Satisfaction whereof she had a Sequestration. And,

3dly.

3dly. The Order of the Lords, that she should account for what she received, must be intended of so much as she received to her own use, but not of what was paid to her only for the Children.

Owen received for the Children, and paid it all for them, and much into their own hands, and it is not more just to charge the Lady than Owen with it: And the Receipt and Employment of the Money was by virtue of, and in obedience to a Decree of the Court while it was in force, which Decree was at the Defendant's motion by his Counsel, and for his advantage, not the Plaintiffs; and after the Decree the Plaintiff nor Owen could not avoid obedience to it, and no Man must suffer for his obedience; and if the Court erred in this, they ought to make restitution who received the benefit of that Error, viz. either the younger Children who enjoyed it, or the Defendant, whose Counsel moved it, and procured it for the benefit of the Defendant, and his Uncle and Guardians were Parties to the Suit, and were present in Court, and consented to the Decree as much as the Plaintiffs, viz. she nor they did not oppose it. And more; for it cannot be conceived that the Infant Children made the Proposition to the Court, but rather Barker and Leonard, Guardians; and if it had been for the disadvantage of the Defendant, to whom they were Guardians, their duty was to have opposed it: And when an erroneous Decree is made in behalf of any one, and an Agent appointed to manage it for such Person, and it be done, when such Decree comes to be reversed, Restitution must be from that Person for whose benefit the Decree was, and not from the Agent.

The Lord Chancellor in the debate seemed very inclinable to relieve the Lady; for he declared that the Lady as Grandmother was not bound to maintain the Grandchildren, but as Justice should order, &c. frequently pressed the Defendant whether he would not at least do something for his Brothers, &c. Declared at last he saw no Equity nor Ground to charge the Lady, &c. and the Decree while unreversed, was to be obeyed: And as this Case was circumstanced, the Court when a Family is to be preserved, younger Children kept from being starved and undone, and care taken by consent of the Persons and Friends in it, and an Estate able to bear it, if this should be undone; All such

Cares and Providence of the Court would be lost, and those already made, revert, which would be inconvenient: But he said I am to obey the Order which limits me; and so as to this part relieved not the Plaintiff.

Dyer contra Dyer. 17 June 1682.

Purchaser.
Incouragement
by one who had
Title.
Ignorance.
Posse,
Hobbs contra
Norton.

THE Defendant's Father granted to J. D. a Rent-charge of 100 l. out of certain Lands mentioned in the Bill under power of Revocation. The Plaintiff treated with J. D. to purchase the Rent, which the Defendant for Twelve years continually paid to J. D. The Plaintiff informed the Defendant that he was in treaty to purchase the Rent, and enquired of the Defendant whether such Grant was made, and whether it had been so paid, and whether it were revoked or not, and the Bill chargeth it so: And that the Defendant confesseth the Grant and Payment, and that it was not revoked to his knowledge. Thereupon the Plaintiff purchased the Annuity for 2000 l. All this the Defendant in his Answer confessed: But whereas the Plaintiff in this Bill charged also that the Defendant promised payment, he denieth any promise. The Cause was brought to hearing on Bill and Answer.

And Mr. Solicitor, the Plaintiffs Counsel, press for a Decree.

The Attorney General moved that the Cause might be put off till a Cross Cause might be brought in, which would be ready, &c. Which Cause was to discover Settlements made by the Grandfather on Marriage, by which the Defendant's Father could not make such Grant: Which Settlements were concealed, and kept from the Defendant.

Mr. Solicitor. Be your Title what it will, it will not hurt the Plaintiff, who acquainted you with his intent to purchase, and you confess payment, &c. so you have thereby encouraged and drawn us into the Purchase, and we have paid fully for it.

Attorney General. We told you nothing but the truth, and were ignorant then of our own Title; our Ignorance must not prejudice us; if we had misinformed you, or having a Title and knowing it, concealed it, that might alter the Case.

Ignorance of a
Man's Title shall
not prejudice it.

Lord

Lord Chancellor. Ignorance of his Title differs the Case, therefore put off the Hearing, &c.

Booth *contra* Booth.

THE Uncle by Lease and Release settled the Lands in question to the use of himself for life, Remainder to Humphrey the Plaintiff, Remainder to his Sons, first, second, third, and fourth in tail; the Remainder to the Defendant for life, Remainder to his first, second, &c. Sons, with power of Revocation, and a Proviso if Humphrey marry without consent of the Uncle during his life, and after his death, of A.B. &c. then the Uses limited to Humphrey and to his Sons to cease, and then to the use of the Defendant. He married without consent, having no notice of the Conveyance or Proviso: But his Uncle (who knew not of the Marriage) entertained him kindly, and gave Legacies to him by his Will, and died. The Defendant disturbs the Plaintiff because of the Forfeiture, and dismiss to Law.

Forfeiture.
Notice.
Trust and Estate,
their difference.

But the Chancellor askt if it were a Limitation of a Trust, or of an Use?

Resp. Use. Chancellor, Then it is at Law.

Anonymus. 3 July.

By a Decree in Chancery a Will of Lands attested by three Witnesses, who at several times subscribed their names at the request of the Testator, but were not present at once together, is a good Will within the Statute.

Will attested by
three Witnesses,
tho' at several
times, good.
Vid. Stat. 29
Car. 2.

Anonymus. *The same Day.*

A Man devised his debts to be paid out of his real and personal Estate; the Executor paid more than his personal Estate, he shall be reimbursed out of the real Estate.

Debts devised to
be paid out of
real and perso-
nal Estate.

Herring

Herring *contra* Walround. *The same Day.*

A Monster
shown for Mo-
ney, Misdemeanor.

207. Bonds mutually to perform Articles.

Herring, Anno 1681. was delivered of two Female Children, they were baptized by the names of Aquila and Priscilla: The Birth was Monstrous, for they had two Heads, four Arms, four Legs, and but one Belly where their two Bodies were conjoined. The Birth was at Ilbremers in the County of Somerset: Many People came daily to see them, and gave Money to the Parents; the Father was a poor Cottage Tenant to Mr. Walround, a Justice of the Peace, who, and the Father entered into Articles that Walround should have the custody of the Children, and the benefit that was to be made by showing of them; but was to pay the Plaintiff One eighth part of that benefit, and to maintain the Plaintiff his Wife and Children (for he had other Children) so long as Aquila and Priscilla lived. The Bill complains that the Articles were gotten from the Plaintiff by surprise, being prepared, &c. but the contrary was proved: The Children lived but a month, and then after the Bill being exhibited to be relieved against the Bond and Articles, and an Account of the Monies received by the Defendant for showing the Children, which the Defendant had embalmed, and caused to be still kept.

The Chancellor much disliked the Plaintiffs doings, Decreed the Defendant to bury the Children within a week, and to account for what he or his Agents had received, and full Costs of the whole Suit to the Plaintiff; who (her Husband the Plaintiff being dead) did revive the Bill.

Collett *contra* Collett. *The same Day.*

William Fox Gent. having Issue three Daughters; Mary Goodwin Widow, Elizabeth late Wife of Samuel Collett, and Martha late Wife of Cornelius Collett, by his last Will dated the 27th of September 1679. among other things, deviseth as followeth.

And

And as to the Residue and Overplus of his personal Estate, concludes his Will in these words: *Residuum to be laid out in Purchases, &c.*

I will that after my Debts which I shall owe at the time of my decease, and my Funeral Expences, and the Probate of this my Will be discharged and paid; then I do give all the rest of my personal Estate unbequeathed, to purchase an Estate near of as good value as the same personal Estate shall amount unto, within one year next after my decease: Which said Estate so to be purchased, I will, shall be settled and assured unto and upon my said three Daughters, Mary, Elizabeth and Martha, and the Heirs of their respective Bodies lawfully begotten, for ever; or otherwise my said Daughter Mary, and the Husbands of my said two other Daughters Elizabeth and Martha, shall for such Monies as they shall receive of my said Executors, for the Overplus of my personal Estate, to enter into one or more Bonds, of the double Sum of Money as each part shall amount unto, the same being to be divided into three parts, unto my said Executors within 18 Months next after my decease, to settle and assure such part or Sum of Monies as each of them shall receive; and by this my Will for the Overplus of my personal Estate, unto and upon the Child and Children of my said three Daughters, Mary, Elizabeth and Martha, part and part alike.

Martha the Wife of Cornelius Collett died about half a year after the Testator her Father, leaving Issue a Daughter, which Daughter died about four months after the Mother: The other two Sisters, viz. Mary and Elizabeth surviving, Cornelius Collett took Letters of Administration as well of the said Martha his Wife, as to his said Daughter.

No Land or Estate was purchased with the 400 l. of the Overplus of the personal Estate given to Martha.

The question was, Whether the Plaintiff who was Administrator both to his Wife and Child, was intitled to the third, or any part of the Residue of Mary's Estate?

The Lord Chancellor dismiss the Bill, and declared he had no part therein, not in Right of his Wife, because she died; and by the first part of the Clause it was to be laid out in Land, to be settled on the three Daughters, and the Heirs of their three Bodies: And by the second Clause Mary and the Husbands of Elizabeth and Martha, are to secure what they receive, &c. pro ut.

Nota,

Nora, In the last Case it was moved, that if Land had been purchased and settled to the Wife in tail, the Plaintiff should have been Tenant by the Courtesy, and therefore should have recompence; sed non allocatur.

Clayton *contra* Duke of Newcastle. July 1682.

The Heir sells in the life of the Ancestor, and receives the Money. The Ancestor dieth, the Heir is decreed to convey.

THE Earl of Newcastle purchased Clipston in the County of Nottingham, to him and to Sir Charles Cavendish in fee, in trust for himself and his Heirs; the rest of his Manors and Lands by Recoveries and Deeds, he settled in Trusts for himself for life, and to pay debts and raise Portions after his death: And the Wars falling out, he went beyond Sea, in which time, viz. of his abode there, the Lord Mansfield his Heir apparent, and Henry his Son, and now Duke acted on the Earl's behalf, sold Clipston to Wakefield in fee for a full consideration, in trust for William Clayton: The Conveyance was made by the Lord Mansfield and Henry his Son, now Duke, and by Rolleston, who was then the surviving Trustee in the great Settlement aforesaid, but was not estated in Clipston, for that was not comprized in that Settlement; but the legal Estate was in the Earl and Sir Charles Cavendish, and the Purchase-money was duly paid to the Vendors, and part paid by them for a Daughter's Portion.

Wakefield and William Clayton, for whom J. S. was Trustee, on Treaty of a Marriage to be had, and Portion, covenants to settle Clipston, inter alia, on the Plaintiff himself, with Remainder, &c. to the first, second, &c. Sons in tail, &c. and a Settlement (tel quel) made accordingly, and Possession accordingly, enjoyed till 1660. when the Earl returned into England, and entered on the Estate, and divers Suits arise between the Earl and Clayton; they both die, the Lord Mansfield dieth, the now Duke Heir to them both being in possession: Clayton, Wife of William, sueth to be relieved for Clipston, being made to her in Jointure, but opposed by the now Duke, on two grounds.

1st. By certain Articles made between the Earl and Clayton, whereby Clayton was to convey Clipston, &c. inter alia, to the Earl; but as to them the Court in a Cause lately heard between the now Duke, then Plaintiff, &c. to have the Articles performed, and 6000 l. paid according to those Articles; had set them aside, because they were waived, and new Agreements made, and other Reasons, and the Duke's Bill dismiss.

2dly. Because the Persons who contracted with, and conveyed to Wakefield, had no Estate in them, nor were trusted by the Earl to sell; but the Estate in Fee of Clipston was in the Earl himself, and Sir Charles Cavendish in Trust, for the Earl; and Sir Charles Cavendish died, and the Earl surviving, the whole legal Estate did vest in the Earl, and is come by descent to the now Duke as Heir to the Lord Mansfield; and the Earl and he had the legal Estate in Law, and Equity also; whereas Mrs. Clayton the Plaintiff had only Equity with her, (if so much.) And then where Law and Equity is, it will prevail against Equity without Law.

And the Defendants deny that the Earl ever gave any authority for the sale of Clipston, or knew of the sale, or imployment of that Money; but that during his Exile, he was maintained by his Brother, and that the Earl by his Entry was estated in his first right, and no way bound by what was done of others.

E contra, That the now Duke having taken upon him to convey, and conveyed the Lands by Indenture under his Hand and Seal, as also the Lord Mansfield did; and receiving the Purchase money, and employed it for the benefit of the Family, and having now no title, but as Heir now that he is come to be Owner of the Lands he sold, he shall be bound to make good the Sale, and accordingly the Lord Chancellor decreed it.

In the hearing of the Cause, offer was made to read Proofs, to support the Articles, because there was no decree in the other Cause, but only a dismissal; but the Lord Chancellor did not admit it.

Bullock *contra* Knight. 14 July.

The Case was.

Term not in-
tailed.
Trust to *A.* for *A.*
the Issue of *A.*
so long as Issue
continu d.
A. sells the term,
it is good.

William Bullock being possess of a Lease for a thousand years, of the Lands in question, in consideration of a Marriage to be had between Henry Bullock, his eldest Son, and Bridget Daughter of Sir John Knight, granted the same Term to Sir John Knight, &c. in trust, that William Bullock should receive the Profits till the Marriage, and after the Marriage to permit Henry Bullock the Son, and his Assigns, to hold the Premises, and receive the Profits so long of the said Term as he should live, and no longer; and after his decease and Marriage, should permit the said Bridget and her Assigns, to hold and enjoy the Premises, and receive the Profits so long of the said Term as she should live, and no longer; and after the said Marriage, and decease of the Survivor the said Henry and Bridget, should permit the Premises to be enjoyed as followeth, but not otherwise, or in any other manner: viz. By the Issues of the Bodies of the said Henry and Bridget, between them to be begotten, for and during so long time of the said Term as such Issue should have a Being, and continue in rerum natura, to take and enjoy in like manner as Heirs in special tail by course of descent to hold and enjoy; and for default of such Issue, should permit the said Henry, his Executors, &c. to enjoy the Premises, and receive the Profits to the end of the term. Henry and Bridget had Issue, Henry and John, who died both without Issue in the life of Henry the Father. Henry the Father assigns to William all his Interest which belonged to him, to William Bullock, Habendum after the death of himself and of Bridget, and of the Children of Henry and Bridget, and dies: Bridget survives him; Sir John Knight takes Administration to Henry, the Son of Henry, Bridget takes Administration to John the Son of Henry; Sir John Knight assigns to Bridget, Bridget assigns to Ann the Defendant; upon whose Plea and the Bill, all this matter appears: John Bullock the Plaintiff claims by the said Deed of William Bullock, and his Executors.

The

The Lord Chancellor took time to advise, and now, the 14th of July 1682. heard Council again, and declared that the Limitation to the Issue, ut supra, vested the Estate in Henry and Bridget, and not in the Issue: And Ann had a good Title, and allowed the Plea.

Culpepper *contra* Aston: *Et e contra*.

SIR Thomas Culpepper, Father of the Plaintiff, seized in Fee of Lands in Plumpsted, &c. by his last Will in writing devised, (viz.) I give to my Daughter Ruperta 1000 l. to be paid at her age of 18 years or Marriage, and to be levied out of all those Sums of Money due from his Majesty for the Wardships of Phillips, &c. and the Residue thereof to my Son Thomas, and that for payment of his Debts, his Lands in Plumpsted, &c. shall be sold by my Executors; and my meaning is, that if all my Debts, and the said 1000 l. may be raised as aforesaid, or out of the Rents and Profits of my Lands, Tenements and Hereditaments, then my Lands in Plumpsted, &c. shall be conveyed to my Son Thomas and his Heirs. And three or four days after, the 9th of March 1642. by Lease and Release, conveys the Lands in Plumpsted, &c. to Sir Nicholas Crispe and Henry Culpepper, to pay his debts: Sir Thomas Culpepper died: Thomas the Plaintiff being his Heir, exhibits a Bill to be relieved and to have the Land, supposing there was sufficient to pay all, without sale of Plumpsted, &c. Cross Bills were exhibited.

1st. The Lord Chancellor declared that when Lands are appointed or conveyed to pay debts, the Heir is intitled to have the Lands after the debts paid.

2dly. A Purchaser buying the Lands is not concerned whether there be Sufficiency or not; but if he buy and pay, though there were sufficiency to pay the debts out of the personal Estate, that yet he should hold the Lands against the Heir, and the Heir must take his remedy against the Trustee; and so if the matters rest in account between the Heir and Trustee, his Purchase is safe tho' the Money be mispended by the Trustee.

1. Purchaser of Lands appointed to pay debts, is safe tho' there be sufficient to pay of the personal Estate.

2. But otherwise if the Purchase be *lite pendente*, by the Heir against the Executor.

Lis pendens.
Notice in Law.

But *Lis pendens*, betw^{en} the Heir and Trustee to have an account, is sufficient notice in Law without actual Notice of the Suit, so that if he purchase, it is at his peril: So that if in the event of that Suit, it falls out that the debts were paid when he purchased, or sufficient of the personal Estate to pay his debts without sale, the Heir will recover against the Purchaser; but if it fall out there was a necessity to sell them, then the Purchaser is safe.

But such dependance of Suit must be real, and not collusive.

Nota, In this Case the Bill was filed the 18th of June 1661. but no Process served on Aston till November 1661. And Sir Robert Aston's Covenant was in July 1661. mean between the Bill and Process served; but at Common Law if an Executor be sued, and after an Original pay a debt of the same nature without notice of the Original, he is excused. But it seems to me the Cases differ, for an Executor is a Person known to whom the Plaintiffs may give notice, but the Purchaser is *individuum vagum*; any Man may purchase, and the Heir cannot know to whom to give notice.

The question that was here, was, Whether the Legacy of Ruperta, the 1000 l. were liable on the Land or no? And true it is, that originally it is not, and there was divers Questions arose upon that.

First, Whether the Will were revoked by the Deed?

The Opinion of the Chancellor was, that it was revoked by the Conveyance; and that was not much opposed.

Secondly, It was objected, that the Legacy of the 1000 l. was given out of the King's debt, which failing, the Legacy failed: And if so, it was agreed the Legacy failed.

Legacy to be
paid out of the
King's debt, that
debt fails.

But it was answered, that the Gift of the Legacy was absolute in the first Clause, the raising it out of the debt, and the following Clause, but a Direction how to come by it the sooner; but then it was objected, that the Will charges only the personal Estate with the Legacy; for as to the Land, tho' the Will at first charged the Land with the Legacy, yet the

the Will being revoked, the personal Estate stands charged with it only, and not the Land.

Resp. It is true the Land does not stand charged with the Legacy originally, but there was enough of the personal Estate to pay the Legacy if it had been so employed; and therefore when that personal Estate is employed for payment of debts in ease of the Heir and Lands, so much of the real Estate as is eased by the personal Estate, shall be liable to the Legacy.

Heir eased out of the personal Estate. Legatee, recompence from the Heir, &c.

The Lord Chancellor decreed accordingly, and a Master to take the Account.

Anaud *contra* Haniwood. 1682.

Benjamin Haniwood Citizen, &c. of London, had Issue the Plaintiffs Wife Sarah, and the Defendant his Son, and by Articles covenanted to advance and secure to his Son 4000 l. to be laid out in Lands, which were to be settled on his said Son for 99 years if he lived so long, the Remainder to his Wife, whom he was to marry, for her life; the Remainder to his first, second, &c. and other Sons in tail, Remainder to the Heirs of his Son, and gave 800 l. to his Daughter in marriage, and after made a Will in writing subscribed by him, wherein he declared his Daughter not fully advanced; and by another latter Will declared that she was fully advanced, and the former Will being revoked, died; but the 4000 l. was paid, and the Land bought and settled: He left other personal Estate of 2000 l.

Marriage. Custom of London.

The Daughter sued in Chancery, and the Questions were two:

First, If the Daughter were full advanced according to the Custom or no? viz. if the Declaration of the Father by Will subscribed, and after revoked, were sufficient to declare her not fully advanced; for such Declaration by Will is of no effect, because the Will was become void; for determining of which, it was written to the City to certify: And 26 April 1681. it was certified from the City, that it was a sufficient Declaration, and so she was admitted to come in for a Child's part, bringing in the 800 l. in Potch-pot.

The

The Cause proceeding to a Hearing, a Second Question did arise, viz. If the Son should share in the 2000 l. without that he brought in the 4000 l. in hotch-pot; for trial whereof it was likewise referred to the Court of Aldermen, who made a special Report, viz. That the Case appeared to them to be, that the Testator in his life-time by Articles of Agreement entered into before the Defendant's Marriage, covenanted with the Defendant's wife's Father, to advance and secure 4000 l. in the hands of Collivill, or such others as should be agreed on at Interest in the Defendant's name, until Lands could be purchased therewith to be settled.

To the use of the Defendant for life, and afterwards to his Wife for her Jointure, and then to their several Children successively, and afterwards to the right Heirs of the Defendant.

And until such purchase made, the Interest of the Money was to be to the Defendant for his life, then to his Wife for life, and afterwards to those to whom the Remainder should have come in case the Purchase had been made.

That the Money was payed and laid out in Lands, in pursuance of and according to the said Articles, before the Defendant's Father's death; and the question being thereupon, whether according to the Custom of the City the 4000 l. so paid and laid out pursuant to the said Articles, be an Advancement to exclude the Defendant from any share of the Diphavage part of his Father's personal Estate, without bringing the 4000 l. into hotch-pot? and they certify,

That a Portion in Money given by a Freeman of London to his Son, has ever been taken for and towards the Advancement of such Son out of his Father's personal Estate within the Custom of the City: Also that Lands of Inheritance settled by the Father on his Son, are no Advancement of the Son within the Custom to bar him of the customary part of a personal Estate.

But whether the 4000 l. advanced and paid by the Testator upon his Son's Marriage, pursuant to the Articles for purchasing of Lands to be settled upon his Son and his Wife, and to the other Uses therein mentioned, be by the Custom of the City an Advancement of the Son, to bar him of such his customary part, they cannot determine, for that they have not known, nor can find in any of the

the Records of the City any precedent of the like case; and therefore they submit the same to the Court, and now the Cause is at hearing on that Certificate. When the Plaintiffs Counsel had begun to argue, that this Money coming only out of the personal Estate of the Father, and the Father thereby lessened his personal Estate, which else would have fallen to his Children, and therefore no way like the Case, where the Father parts with his Lands to his Son, and would have proceeded to other Reasons that the Custom of the City is the Law of the Place, and not tyed to such strictness as private Customs of Villages, or Places are.

The Lord Chancellor interposed, and said that it was a clear Case, and he had known so in his time, several times, and that in this very Case: The Mayor and Aldermen were of that opinion; and making some Reflections, as that the Certificate had not been fairly obtained, decreed against the Plaintiff, that the Defendant might share in the 2000 l. without bringing the 4000 l. into hotch-pot.

Beckford *contra* Beckford. *The same Day.*

Decreed that where a Citizen had several Children, and some of them are advanced and some not, the advanced Children die, the Father dieth, there shall be no Consideration had of the dead Children who were advanced, but it is all one as if they had never been.

Doyly *contra* Smith. 16 July.

A Question was, Whether a Settlement made on the Defendant's Wife on payment of 2000 l. were so made as that it was redeemable as a Security or no by those in Remainder, after an Estate tail limited to the Defendant's Wife. John in Remainder in tail exhibited a Bill, being the next in Remainder, to redeem and pay the Money; after Witnesses examined, and the Cause heard, he was dismissed: But pending the Suit he levied a Fine, to the intent to enable himself to pay and redeem, and limited the use as before, which was to the use of the Heirs Male of his Father Robert. To which he and the Plaintiff his Brother were Inheritors; the

New Bill after
dismissal on the
same Equity by
a third Person,
because he could
not have a Bill of
Revivor.

Dis.

Dismissal of John was pleaded in Barr; the Plea overruled, because he could not have a Bill of Review, tho' the former Bill of John was grounded on the same Equity 16 July, 1682. but it was said that the former Dismissal was on other matters.

Nott *contra* Hill. 20 July, 1682.

Bargain of excessive value gained in time of necessity set aside.

SIR Thomas Nott, Father of the Plaintiff, upon some occasion not very justifiable on his part, viz. because 10000 l. which was to be laid out in Lands for his Children by Mrs. Thinn his first Wife, Mother of the Plaintiff: The Plaintiff did not consent that his said Father, then married to a second Wife, should have that Money; the Father allowed the Plaintiff no maintenance at all, but he was put to extremity of misery and want; and having an Estate tail in a Building at Richmond, called the Queen's Stables, of 30 or 40 l. per Annum value, a Remainder after his Father's death with Remainders to others. Hill, Father of the Defendant, an Attorney at Law, did in the time of the Plaintiff's necessity furnish him with 30 l. and agreed to pay him 20 l. per Annum during the joint Lives of him and his Father; which Annuity was paid for five years; he conveyed to Hill the said Buildings in Fee, and the Bill now is to be relieved, and have a Reconveyance, as being a Conveyance gotten at a great undervalue and gained by extremity, working on the Plaintiff's necessity, and such Conveyances and Bargains gotten from young Men in their Fathers Life time, have been often relieved when they have been gained by occasion of the Weakness, viz. Prodigality or Necessity of young Men in their Fathers time; and there is no difference whether such Bargains be for Lands or Money.

E contra. The Defendant's Counsel objected, That here is no Art used to draw the Plaintiff into the Bargain; he hath no Money lent, but the Bargain was of his own seeking, and was hazardous; for if the Plaintiff had died, being Tenant in tail, the Money had been lost; and if the Father had lived it might have proved a hard Bargain, the Houses are ruinous, and of but small Value.

Lord

Lord Chancellor. Put the Case Hill had given him 30 l. to have five times so much on the Father's death, should not the Court relieve in such a Case? Here you have five times the value in Land; and decreed for the Plaintiff. He said, by the Civil Law a Bargain of double the value shall be avoided, and wish'd it were so in England.

A Bargain of the double Value by the Civil Law set aside.

Pollard *contra* Downes. 21 July, 1682.

Trustee al autre use made a Letter of Attorney to J. S. to manage and receive the Rents and Profits of the Lands, who did so, and accounted to the Trustee, and now being sued by the Cestuy qui trust insisted that the Trustee, not he, was to account, and he having already accounted he might be quiet as to the Plaintiff; But the Chancellor decreed him to account to the Plaintiff.

Double Account by the Servant of the Trustee.

Note. The Trustee was dead, but that was not yielded as the Reason.

Barebone *contra* Barnes. 22 July, 1682.

Barnes possessed and interested in the Lands for sixty years, yielding 5 l. per Annum, and indebted and in danger of an Arrest, by Articles sealed assigned his Estate to the Plaintiff for 290 l. and his Tools and other Utensils on the Premises, then employed for making of Brick. The Articles are dated 16 March, and a Proviso that if the Money were not paid, &c. in five days then to be void; the Articles were not performed or Money tendered, but there being no Proviso in the Articles for the discharge of the Defendant, for the Rent in future, there arose some discourse about it: They both went to Mr. Mosier, a Councello, about it, and he propounded that Barebone should endeavour to purchase the Inheritance, or else procure a sufficient person to take the Assignment from Barnes and secure him, or to that effect; and to that end the Matter to be respited for fourteen days. Barebone treated with the Reversioners, but they would have nothing to do with him; he notwithstanding took possession and brought in Materials, and agreed with the Labourers, but the time when, did not clearly appear, but it seemed to

R

be

he within the fourteen days after, but the fourteenth day Price a Banker came with him and brought 290 l. and Price offered himself to be Assignee, and that he would covenant for the Land-Lord's Rent, but no Writing was offered or prepared. Barnes took advice of Council and also of one West, which West first made the agreement for the same with Barnes (as he said) for an able and sufficient Friend of his, but would not discover his Name till the Articles for Barebone were prepared. Barnes sells his Interest for 290 l. to the other Defendant, and the Bill is to have an assignment to the Plaintiff, because Barnes had notice. Barebone had only given 20 l. earnest, and now the Cause was heard; and the Plaintiffs Bill dismissed.

D E

Term. Sanct. Mich.

Anno Regis 34 Car. II.

In

CANCELLARIA.

Brent *contra* English. 13 Octob. 1682.

A Mortgages to B. then after C. hath Judgment in Debt against A. and then after A. mortgageth to D. B. D. and A. accounted what was due to B. D. paid him his Money, and B. assigns his Mortgage to D. C. sues D. to pay him the Debt and to have an account of what was really due to A. and himself. D. pleads the former Account. Mortgage and double Account.

1st. Lord Chancellor declared that C. was to be admitted to redeem paying what was due.

2dly. But it was debated and insisted on by the Counsel of D. that the Account should conclude C. though no Party thereto.

Lord Chancellor remembred Cox and Shearman's Case pro Quer.

Resp. There the Account was litigated, here it is voluntary.

Lord Chancellor. Answer the Bill.

Haycock *contra* Haycock. *Eodem die.*

Double Account
Party.

THE Testator devised 600 l. to A. 700 l. to B. 700 l. to C. The Executor wasted the Estate, B. sueth her Executor, who pleads in Abatement of the Legacy to C. and that the Testator by the Will did also appoint that if his Estate fell short to pay them, that each Legatee should proportionably abate, which is no more than what the Law is in such Case. And if his Estate did increase and improve then each Legacy to be proportionably increased, and therefore C. ought to have been Party to the Bill, for the Account made with the Plaintiff will not conclude C. and so he should be put to two accounts and double Proof and Charge.

Solicitor pro Quer. In case a Legacy had been given to two, one could not sue; or if Residuum bonorum be given to divers, they must all joyn; but when Legacies are given to divers persons, each alone may sue for his own Legacy.

Chancellor. Answer without Costs.

James Bovy *contra* Smith and Bony.

Devise.
Estate.

MR S. Abeel, Mother of the Plaintiff, and to whom he is Heir at Law, had four Daughters, Sisters to the Plaintiff. Mrs. Abeel seized in Fee of Houses in Chelsey, those Houses were by her conveyed to William Bovy and four others, to the use of them and their Heirs, in trust to convey the same to such person and persons, and for such Estate and Estates as she should appoint, and in default of such appointment to the Plaintiff and four Sisters equally to be divided, and to their Heirs. She after made her Will, and thereby appointed the Trustees to convey the Houses to the Daughters, not mentioning for what Estate, and after to such the eldest Child of the said Daughters as should be living at her death, and died.

The

The 1st Question was, Whether the Plaintiff, her Heir at Law, had any Title to the Trust after the death of the Daughters and Child, and it was decreed that by the Will, that Daughters and Child had but Estates for Life in the Trust, and the Fee is limited by the Will to them in default of appointment; but she having appointed another Estate to them, and what she did not appoint, viz. the Trust of the Fee-simple descended to the Plaintiff her Heir.

2dly. The Question was, Whether though the Plaintiff had once a Title, yet whether by other matters in the Case he was not barred, viz. three Fines with Proclamations, Purchase made for valuable consideration, an Arbitrement also whereto he was Party, and two Releases, viz.

William and the other Trustees did convey the Houses to the four Daughters and their Heirs; their Husbands are Parties to the Conveyance which expelleth, that it was in performance of the Trust, after several Purchases and Conveyances of the several Shares were made among the Husbands and their Wives, and several Fines with Proclamations levied, and all came thereby to Box in Fee; and he and his Trustees for 1250 l. conveyed to the Defendant William Bony in Fee, who was one of the first Trustees, and many more than five years Non-claim by the Plaintiff were elapsed before the Bill.

17 Octob. 1682.
34 Car. 2. this Cause decreed.

First, It was answered, That the Non-claim or Fines could not hurt the Plaintiffs Title, because the Fines were levied to Parties privy to the Trust, so as what Estate soever passed to them the Trust was not disturbed, for they who purchased with Notice and Privy are still liable to the Trust.

Fine no bar of Trust if Notice.

Sir John Churchill insisted e contra. That if a Trustee for valuable Consideration alien by Fine with Proclamation to one who hath notice, the Alienee shall be subject to the Trust, but the Cestuy qui Trust must within the five years sue and make Claim, or else he shall be barred, for the Alienation was a breach of Trust and Cause of Suit.

Lord

Lord Chancellor e contra. There were then no safety of any trust, if a Trustee or Mortgagee should levy a fine to one who hath notice, if that should bar by non-claim: He therefore decreed, that notwithstanding those fines and Non-claim, the Plaintiffs Title was untouched by them. He further declared, that a Title in Equity or a Trust, is and should be barred by Non-claim and fine; but that must be where the Person to whom the fine is levied, hath no notice; and in such case the Claim must be a proper way: If it be of a Trust or Title in Equity, it cannot be by Entry, but Subpcena; and if he have Title by Writ at the Common Law, and his Entry not lawful, an Entry is not good to save the Right.

Reviver of trust.

2dly. Admitting the fine and Non-claim did bar the Plaintiffs Claim of the Trust: Yet when he that broke the Trust, comes afterwards to be Owner of the Land, tho' on good and valuable Consideration, the Trust as to him revives again, and he shall be liable to make Satisfaction, and restore the Land to the Trust, and it shall not lie in his Power to defend himself, by breach of Trust, and this is so at Common Law for Lands. A Disseisor Aliens; the Alien dieth seised: Now the Entry of the Disseisee is barred; but if the Land come again to the Disseisor, the Entry of the Disseisee is revived. So for Goods, if a Trespasser of Goods sell them in Market overt, the Owner's Title is barred, but he may seise them if they come to the Trespasser again: So in a case of Equity, Norton against the Earl of Dunblow.

Churchill. William Bony was but one of the four that broke the Trust.

Lord Chancellor decreed for the Plaintiff.

Release.

3dly. As to the Release and Arbitrament, it appeared tho' the Release was of all Actions and Demands; yet it appeared that the Arbitrament, Submission and the Release, was made on Differences only, concerning other matters, viz. the Shares of the Parties of the personal Estate of another dead Kinsman, and was for them and their Executors to the Parties and their Executors, and not Heirs.

4thly. The Plaintiff had given a distinct Release before the Purchase made, of all Actions real and personal; yet there was no occasion proved why that Release should be made, nor any alledged, and there were other Dealings between

tween them: Therefore presumed not to relate to this matter, and so the Decree passed for the Plaintiff.

Afterwards the Lord Chancellor declared at another day, that he had conferred with the Chief Justice of the King's Bench, who was of the same opinion.

Davies *contra* Moreton. Nov. 1682.

Moreton possessed of a Lease for years, for 200 l. as Forfeiture. signed to the Plaintiff Davies, on condition not to alien without Licence. Davies without Licence mortgaged the Lease. Davies becomes a Bankrupt: The Commissioners assign to the Plaintiff, who exhibits his Bill to be relieved against the forfeiture, and to redeem, if so be that the Mortgage were before the Act of Bankruptcy; for the Mortgage was pretended to be but five weeks before the Commission: Moreton waives the advantage of the Forfeiture, if he may be paid the 200 l. which was the Consideration of the Assignment he made; but he had on the Assignment taken Bond of Davies for it, and that was a Security, and determined the Contract for the 200 l. so he had chosen his Security, and might not thereby charge the Lease, or the Assignee thereof, if he had taken an Assignment. And further, he did actually come in as a Creditor for the 200 l. before the Commissioners, and paid Contribution.

But the Lord Chancellor would not relieve against the Forfeiture without payment of the 200 l.

Quære, If he would at all relieve against the Forfeiture, unless Moreton had offered it in his Answer, so as he might be paid the 200 l.

Husbands *contra* Husbands. *Eodem die.*

A Seised in Fee, made his Will in writing, and charged his Lands and personal Estate with 400 l. to finish a Building which he had begun, and was unfinished when he died; the Will as to the personal Estate was good, but not good as to the Land.

Lands charged
by Will to finish
Building not
good.

Hobs

Hobs *contra* Norton, &c.

The Case.

Purchaser not
relieved against
the Title of *A.*
who encouraged
him to purchase
when, and when
not.

THE Father of two of the Defendants, granted to the younger Brother and his Heirs, an Annuity, charged on the Land in question, with power of Revocation, and died: The younger Brother treated with Hobs to sell to him the Annuity: Hobs before his Purchase enquired of the elder Brother whether there was any Revocation made; he told him none; that he had still paid the Rent, and knew nothing to the contrary but that he must pay it, and much to that effect, and continued payment. Hobs for valuable and full consideration, purchased the Annuity of the younger Brother. The elder Brother after some time of payment to Hobs, refuseth payment of the Annuity. Hobs exhibited a Bill to be relieved, as in Amy's Case, where a Mortgage or Conize of a Statute was enquired of by him who was in treaty to purchase the Land, whether the Land was free of Incumbrances, and was told by him that there was none, and that he might safely purchase: Whereupon he purchases, and was relieved against the Mortgage.

The Heir's Defence was, that he did acknowledge the Enquiry, and his Answer thereon, but then knew nothing to the contrary; but yet that ought not to prejudice him, for that since then he had discovered a Settlement made by the Grandfather, on Marriage of the Father, Grantor of the Annuity: Whereby in consideration of Marriage, and a valuable Consideration of Money, the Lands were intailed on the Father, to which Intail he was Heir, and by consequence the Grant of the Annuity void as to him; and that this Settlement was concealed from him till of late, that his Payment and Acknowledgment was while he was ignorant of his Right, and innocently done, and ought not to oblige him: That Amy's Case differs from his; for there was a fraud to draw on a Purchaser, in encouraging the Purchaser against his own Act and Knowledge; it was fraud if not Malice, to do so.

There was another Point arose on the debate, but as to this the Lord Chancellor delivered no opinion.

Aunand

Aunand & Ux. *contra* Honiwood.

A Citizen and Freeman of London having two Chil- London Orphanage part.
dren, married one of them and gave her a Portion, and after made a Will in writing, and gave her a further Sum; declaring therein that his Estate should be divided, according to the laudable Custom in Chirchs, &c. Which Will was subscribed by him, afterwards he made two other Wills in writing; wherein, (being also by him subscribed,) he declared that he had fully advanced the said Daughter; and in the last did upon that Reason, give her 500 l. she marrying the Plaintiff, they sue in Chancery for a Child's part, bringing into hotch-pot what she had received, and that the other Child might bring into hotch pot what he received; the Suit was against the Executor, &c. And decreed accordingly upon the Certificate of the Recorder, Ore tenus, made the 10th of May, Anno 1681. who certified that by the Custom of London, That a Declaration made by a Citizen and Freeman, &c. with his Hand or Mark subscribed thereto, tho' such writing were made for the last Will and Testament, and the same afterwards by him revoked, is such a Declaration as will let in such a Child of such Freeman, to a Child's part.

And it was further decreed, that the Defendant be examined before a Master on Interrogatories; to one whereof he demurred, and set forth that he and the Testator were Joint-Partners in the Trade of a Woollen-Draper, and each brought in 1000 l. into the Stock; so they were Joint- Surviving tenants, and he was Survivor, and claimed the whole Tradesman. Stock, and the debts belonging to the Stock by Right of Survivorship; but the benefit of Survivorship was denied, being in Trade, tho' not Merchant Adventurer.

Jones *contra* Waller. Novemb. 1682.

A N Administrator possess of a Term charged with a Assignment of
Trust, assigns it in trust for himself: The Admini- a Term by the
stration on a Suit by Citation, (not Appeal) is revoked, Administrator
and now granted to the Plaintiff: At his Suit the Assign- to his own use,
ment decreed to be set aside. set aside by sub-
sequent Admin-
istrator.

§

Anonymus.

Anonymus. *The same Day.*Deviation,
nauticum fœnus.

THE Plaintiff entred into a Penal Bond of Bottom-ry to pay 40 s. per Month for 50 l. The Ship was to go from Holland to the Spanish Islands, and so to return for England: If she perished the Plaintiff lost his 50 l. She went accordingly to the Spanish Islands, took in Moors at Africk; and upon that Occasion went to the Barbadoes, and then perished at Sea. The Plaintiff being sued on the Bond for the Penalty, sought relief in Chancery, pretending that the Deviation was on necessity.

The Bill was dismissed saving as to the Penalty.

Uvedale *contra* Ettrick. 6 Decemb. 1682.

MR. Uvedale, the Plaintiffs Husband, being seised of the Mannors of Loverley and Monuton, and of the Farm of Martin, worth 600 l. per Annum, and of the Mannor of Horton worth 500 l. per Annum, and indebted 10000 l. made his Will, and thereby devised the Premises to be sold, and devised 1500 l. to one Child, and 1000 l. to two others; and after his Debts and Legacies paid, the Surplus of the Land to be conveyed to his Heir: The Devisees which were to sell, were the Wife, who is the Plaintiff, Ettrick, Reeves, Hurst and Constantine. The Testator died, having after his Marriage with the Plaintiff, mortgaged Horton, so as the Plaintiff was dowable of all the Estate. The Defendants to the Bill were the four Trustees, and the Heir which was to have a Sale made, but principally that Ettrick might be put out of the Trust. The Wife, one of the Trustees, was drawn into Agreement to release her Dower in the 600 l. a year, and to give a Bond of 4000 l. that if any of the Children died, she should not take Administration, except they all died; after which Ettrick turns to be the Plaintiffs Enemy, and divers matters are charged in the Bill upon Ettrick, as if he promised to get Horton, and to be the whole Manager himself. Reeves in his Answer prays to be excused in the Trust; Constantine and Hurst were not willing to join with Ettrick in the Trust.

At

At the hearing the Plaintiff declared, being present in the Court, that though she had reason to be relieved against her Release and Bond, in regard by the Agreement she was to have her Dower set out of Horton, and the Household Goods in Horton-house; yet still she was contented to accept such Dower in the Third of Horton, which amounted but to 150 l. per Annum, and to join in the Sale of the rest of the Land, thereby to extinguish her Dower therein, and to leave the Goods in the House for the Heir, so that Ettrick might be discharged of the Trust: On the other side, Ettrick insisted to be continued in the Trust, and would attend a Master from time to time to get a Purchaser, and to do all reasonable Acts, &c.

The Plaintiffs Council insisted, it being a Joint Trust, A Trustee removed out of
and could not now be so executed, all refusing to join with Ettrick, therefore it belonged to the Court to order it. the Trust.

Lord Chancellor. I like not that a Man should be ambitious of a Trust, when he can get nothing but Trouble by it; and declared that without any Reflection on Ettrick, he should meddle no further in the Trust, &c.

D E

Term. Sanct. Hill.

Anno Regis 34 & 35 Car. II.

In

CANCELLARIA.

Tilley *contra* Throckmorton. Febr. 1682.

Trustee charged
on decay of the
Estate.

A Trust to pay several Portions to several Children at their respective Ages : The Trustee pays one ; the Estate decays, so that there is not sufficient to pay the others ; in that Case the Person trusted payed in his own wrong, for he shall make it good to the rest, abating proportionably out of each Party's share, according to the loss ; and he should have taken Security in case of loss happening : And so also tho' the Trust or Legacy were to be paid to the eldest in the first place, or first, for that denotes not preference in the quantity.

And it was affirmed by Mr. Keck, and others at the Bar, that many times it had been so decreed.

But the Lord Keeper North seemed of another opinion as to the last Point : But agreed further at the Bar, that if the Portion of any one lay on, or out of Blackacre, or other particular fund by it self, and the others out of another fund, each must bear his own loss.

Denny

Denny *contra* Filmer. 1682.

A Decree passed where the Bill was never answered; No new Bill after Review. but the Bill taken pro confesso, tho' the Party Defendant never answered, but only appeared by his Clerk, and the Bill never read in Court as it ought to have been: A Bill of Review was brought, and on Demurrer dismiss: Now the Petr brought another Bill of Review; and though there was manifest Error, not only in the form of the Court, but in the Right, viz. two Petrs having Title as Petrs, one of them Plaintiff had a Decree for the whole, who had title but to a moiety.

Pet my Lord North dismiss the Bill, and said there was no remedy but in Parliament, and cited Mordant or Morgan's Case: Where a Bill was grounded on a Deed, whereto two Witnesses were examined; but the Deed was not produced, and the Witnesses not agreeing, the Bill was dismiss, and a Bill of Review was brought and dismiss: And after the Deed was found, and Affidavit of it, &c. and then a Bill of Review exhibited, but dismiss quia of the former Bill.

Which, said the Lord Keeper, was a hard Case.

To which it was answered, that it differs from the present Case; for there the Cause was heard on the Merits, but here is not so much as an Answer.

Lord Keeper dismiss the Bill.

Anonymus. February 1682.

THE Bill was to discover and have Use of a Deed, which was to lead the Use of a Fine levied by the Defendant's Mother, and concealed and suppress by her. Voluntary Conveyance no relief for Deeds against Heir.

The Case.

The Defendant's Mother seised in Fee, she and her Husband levied a Fine, which by Deed was declared to be to the use of the Husband and Wife, with other Uses, under which the Plaintiff makes title, viz. by the Husband's Will, the Fee being limited to the Husband.

The

The Complaint is, that the Defendant suppresses the Deed. The Defendant is Heir to her Mother, and insists that the Fine was gained unduly, and denieth the having the Deed, which was voluntary without consideration: And because the Conveyance by the Fine, &c. was voluntary and without consideration no Money being paid, &c. the Court would give no Relief, but left the Plaintiff wholly to Law to help himself there as he could.

Coventry *contra* Hall. 24 Feb. 1682.

Heir to answer
Mean Profits
taken by him
to purchase tho'
the Conveyance
void in Law.
Two decrees for
Land, yet a new
Bill for Mean
Profits.

SIR Thomas Thinn had Issue Sir James by one Venter, Sir Henry Fredrick by another, and made a Conveyance of several Mannors on Henry, which being designed by way of Covenant to stand seized was defective, and afterward was decreed in Chancery to be relieved, and likewise settled by Act of Parliament.

Afterwards 1650. Sir Henry Thinn exhibits a new Bill against Sir James for the Mean Profits, which was decreed that Sir James should account for the Mean Profits from the year 1646. when Sir James got the Possession. The Suit divers times abated by death, so the Decree was not completed. Sir James was dead and made Thomas, his Brother, Executor. Thomas dyed and made the Defendant his Executor; Sir Henry likewise died and made the Defendant his Executor.

The Cause came now to be Re-heard touching the Mean Profits between the Executors, ab integro. Two Points were debated.

1. Whether Sir James, or especially his Executors, should be accountable for the Mean Profits, for he had a Title at Law, the Conveyance being defective, and being under no Obligation of Trust or Covenant or Articles, as Heir unto his Father; and the defective Conveyance it self is not mentioned to be in consideration of Marriage, or valuable consideration, and therefore Sir James was not guilty: But Curia e contra.

2. The second and main Question was, Whether a Decree being first had for the Land, and no Decree for the Mean Profits, a new Bill shall be exhibited for the Profits,

sits, especially, because in the first Bill Sir James was charged for taking the Profits, and Relief prayed on the whole matter, so that Sir Henry if he had asked it might have had Relief for the Mean Profits; and it is not denied but that he might have had a Decree, if he had prayed it.

My Lord North confirmed the former Decree made by the late Lord Nottingham for the Mean Profits, and that the Executor of Sir Thomas Thinn, Executor of Sir James, should account for them so far as the Estate of Sir James, &c.

Brown contra Williams. 28 Feb. 1682.

THE Assignee of a Bankrupt exhibits his Bill against the Defendant to discover Goods of the Bankrupt, that came to his hands after the Bankruptcy. The Defendant by way of Plea sets forth, that he had no Goods of the Bankrupts, or that ever were his, but what he bought for full and valuable consideration, and bona fide; and that at the time of the Sale and Payment of his Money, he had no notice either of the Commission or of any Act of Bankruptcy committed by the Bankrupt.

Purchaser of Bankrupt without notice not bound to discover. Bankrupt.

On long debate the Plea was allowed by the Lord North, and to take what remedy they could before the Commissioners, or at Law.

Hutchins, Counsel for the Defendant, cited a former President, but was not produced.

Leak contra Morrice. The same Day.

THE Bill is to have an Agreement performed by the Defendant, which was in effect, that the Defendant should assign a Term of years in his House, and Plate, and certain Vessels of Beer for 200 Guineas, whereof he paid one in hand as Earnest of the Bargain, and three days after 19 Guineas more; and part of the bargain was, that it should be executed by Writings by a certain time.

Stat. 29 Car. 2.

The Defendant pleaded the Statute for prevention of Frauds and Perjuries, and that it was a parol Agreement, and none of the Goods delivered by the Defendant, so there ought

ought to be no relief in Law or Equity, but confess the receipt of the 20 Guineas, and offered to repay them.

Keck pro Def. at the Bar enforced the Plea, because it was to take away the Defendant's trade, and alledged the Money was only paid for the Lease.

Lord Keeper. Its clear the Defendant ought to repay the Money; it is charged that the Agreement was to be put in Writing.

It was answered, *Pea.*

Whereupon the Lord Keeper over-ruled the Plea.

Anonymus. *The same Day.*

Purchaser without Notice of Bankruptcy not chargeable in Equity to discover.

A Signer of the Commissioners of Bankrupt. Portman exhibited his Bill against the Defendant to discover Lands, &c. which were the Bankrupts at the time of his breaking.

Hutchins for the Defendant pleaded that he was Purchaser for full and valuable consideration, and at the time of his Purchase, and had no notice of any Act of Bankruptcy, nor that Portman was a Bankrupt, nor of any Commission, and refused to make discovery.

And the Plea was allowed by my Lord North, Lord Keeper.

Barney *contra* Beak. Feb. 1682.

Casual Bargain for double value.

THE Bill, That the Plaintiffs Father being aged and infirm, and allowing the Plaintiff, a young Gentleman, but small allowance, that he being in want one Stryfed got acquainted with him, and told him that he had found out a parcel of Wines, which if he would buy he should not be enforced to pay for them till after his Father's death; they went to Beak the Defendant, who sold him several Hogsheads of Wines to the value of 1280 l. and affirmed them to be of that value, and sound, good and Merchantable; and took of the Plaintiff a Statute of 2880 l. 17 November, 1678. defeazanced to pay 1440 l. within twenty days after the death of his Father. The Wines were

were flat and dead, and were delivered to Stysted, who could sell them for no more than 360 l. that the Plaintiff's Father was but Tenant for Life, the Remainder to the Plaintiff; that this was done by contrivance between the Defendant Beak and Stysted by their fraud, and Stysted had 20 l. of the Plaintiff, and other gratification of Beak, and the Plaintiff's Father being dead the Defendant Beak proceeded on the Statute.

The Defendant Beak by Answer, that he knew not Stysted, but he and the Plaintiff came to him to buy of him Wines, and he sold the Plaintiff twenty Tuns of Claret at 36 l. the Tun, in all 740 l. and after much treaty agreed, that if the Plaintiff died before his Father then nothing to be paid; but if he survived his Father, to pay double the value, viz. 1480 l. That the Wines were good and sound, and the Plaintiff sent Ady, a known Cooper, to taste and try the Wines, who did so; and the Plaintiff to encourage the Defendant to sell, did inform the Defendant that his Father was sickly and kept his Chamber, and denied the fraud, and that he sold the Wines which were left, at the same price.

Trin. 1686. this Decree reversed by the Lord Jeffries ex relatione Servien's Hutchins.

At a former Hearing, 9 February, 1680. the Lord Chancellor relieved the Plaintiff.

But now the Bill dismissed saving as to the penalty of the Statute, for there was no proof of any fraud, but it was a hazardous bargain.

Lord North. It may be Stysted put in other Wines, or took out of these and filled 'em again with bad.

Nota. That the same day, viz. 9 Feb. 1680. when the Lord Chancellor relieved Barny; he did not in another Case relieve though very like it, viz. between the now Plaintiff Barny and Pit. Pit lent Barny 1000 l. to have 2500 l. if Barny survived his Father, and to lose the 1000 l. if Barny died in his Father's life time, secured by Judgment; Pit sued; Barny sought to be relieved in Equity and was dismissed.

1. *Pro Quer. per the Lord North.*
2. *Pro Def. per the Lord North.*
3. And then reversed by the Lord Chancellor Jeffries.
Trin. 1686.

Amand *contra* Bradburne.

Trustees allowed
several losses.

TRustee sued concerning the Trust in Chancery obtained a Dismission and had Costs paid him as in course, but the Costs allowed him and taxed were short of his real Costs. After a Bill by the Cestuy qui Trust to have account of the Trust, on account of his disbursements he shall be allowed his true and necessary Costs in the former Suit, and not be concluded, &c. and so ordered.

D E

Termino Paschæ

Anno Regis 35 Car. II.

In

CANCELLARIA.

Lord Craven contra Widdows. 27 April, 1682.

TWO Partners in trade put in each an equal Stock, and agreed by Covenant that the Stock should pay the debts of the Stock, and neither of their separate debts should charge the Stock, but only his own Estate, or to that effect; they both became Bankrupts, and a Commission against them both, one of them owed separately more than the other.

Partners both Bankrupts.

The Question was between separate Creditors of each Bankrupt, and the Creditors on account of the Joint Stock, for these would exclude the separate Creditors to charge the Joint Stock, but that it should satisfy the Stock Debts.

Creditors of the Joint Stock, and separate Creditors equal.

But the Opinion of the Lord North e contra. For the Covenant of the Partners cannot bind any of their Creditors, but only themselves.

Quære. How the separate Creditors could have other Title than those under whom they claim.

Process.

Dicitur, That if one Defendant cannot be found to serve Process on him, if Process be against him till Sequestration, and he shall not appear, you proceed against the rest, as when one is outlawed at Common Law.

Brown *contra* Brown. 30 April, 1683.

Arbitrament.

THE Plaintiff was Tenant for Life, the Remainder in tail to his first, second, &c. Sons, the Remainder to the Defendant in tail. The Plaintiff having no Son committed waste; the Defendant brought his Action for the waste, and at the Nisi Prius by consent of the Parties and Rule of Court the Matter was referred to two of the Jury to make their Award by Michaelmas; on defect of an Award then to Ballard an Umpire; no Arbitrament being made the Umpire made his Award and awarded 348 l. damages; the Plaintiff exhibited his Bill to be relieved against the Award, and for Equity alledged:

First, Excessiveness in the Damages.

Secondly, The misdemeanour in the Umpire, that he had declared before the Umpirage made, that he would not meddle in the matter, and after Umpirage made, declared that he made his Umpirage for fear he should be arrested, whence his Counsel inferred that he had been menaced.

Lastly, That after the Submission the Defendant had repaired the Premises, and proved Repairs made, and that 40 s. would perfect the Repairs, and therefore prayed a new Tryal.

The Defendant insisted that the Umpirage ought not to be set aside without fraud or partiality proved, that his saying he would not meddle in the business was in August before the time he was to make his Umpirage, as the truth was; and the Defendant had notice given him by the Umpire to attend, which he did not, so that the Umpire had no notice of the Reparations, and if he had, it was not material to avoid the Award.

The Lord Keeper dismiss the Bill.

Baily *contra* Cotton. 13 May, 1683.

BEmble seised in Fee conveyed the Lands to the Defendant for 1000 years, in Trust, that whereas divers Suits and Controversies were touching the Lands; that the Defendant should defend the Suits (Nota, he was Tenant of the Land then and before to the Plaintiff)

tiff) and Title with the Profits and yearly Accounts to Bemble of all the Profits, and pay to him, his Executors and Administrators the surplus of what he should not expend, and should pay an annual Sum after his death to the Plaintiff, and another annual Sum to another, and died; the Plaintiff was his Cousin and Heir and sued for Account and for the Lands, in regard that a Trust resulted to the Heir after the expressed Trusts were performed.

The Lord Keeper dismiss the Bill.

D E
Term. Sanct. Trin.

Anno Regis 35 Car. II.

In

C A N C E L L A R I A.

Foot *contra* Salway & al'. 6 June, 1683.

Freight.
Merchant.

FOOT let to Freight to the Defendants being of the Turkey Company, 200 Tun of a Ship, where in he was interested, for a Voyage to the Streights, the price of the freight per Tun was not expressed in the Charter-Party. The Ship brought home no Silk or other Commodities, used to be brought from Turkey; the Freight whereof of some in such Voyages was 5 l. per Tun, and of some 6 l. per Tun usually and constantly paid, but brought home only Box wood, the Freight whereof usually was only 40 s. per Tun; the Defendants would pay but 40 s. per Tun; the Plaintiffs Bill is to have 5 l. because though it be not so express in the Charter-Party; yet it was expressly agreed, that the Ship should be laden with Silks or other the Goods that paid the greater Freight and enforced their Equity; for that Box wood never in such Voyages was brought home alone, but only to fill up empty places, but Cottons or other Goods, and no Man will ever let out his Ship, nor take Ship to freight for Box wood only, for the freight at 40 s. per Tun will not pay the Charge to the Owner of the Ship; and although the Defendants pretend that they could not freight the Ship with other Goods, because the Locusts in that year had eaten and spoiled the Cottons in those parts, yet that

that might not excuse them from their Agreement, which the Plaintiffs Counsel very earnestly prest to have read and proved, especially Mr. Solicitor Finch, who finding the Court against relieving the Plaintiff upon the parol Agreement said, that most part of the Causes in Court were of that nature; yet the Court would not agree with him: But you may take remedy at Law upon your parol Agreement.

Solicitor. No, my Lord, because the Deed is the Agreement in Law.

Lord Keeper. Why, when it stands with and not contradicts the Deed, you may sue at Law; and on Conclusion did not relieve the Plaintiff.

Alderman Backwel's Case. Post.

Commission at the Complaint of fifteen Creditors on Bankrupt. the Statute of Bankrupts, issued out against Alder. *Superfedeas.* man Backwel, who died shortly after; these Creditors *Commission.* having Judgment, and finding that on their Judgment they might have better remedy than their proportion was likely to be on the Commissions: The Heir of the Bankrupt paid their Debts, and none other Creditors appearing then to prosecute, by their consent the Commission was superseded, and after thirty other Creditors sued for a discharge of the Superfedeas.

First, Because when a Commission is granted, not only the first prosecutors are interested therein, but all that will come in within four Months; and therefore they having tendered Contribution within the four Months the Commission ought not to have been superseded by consent of the fifteen.

Secondly, They alledged that the Commission had been dealt in by the Commissioners, and an Assignment of Lands made, and the Alderman being dead, they should be remediless, for no new Commission can be now granted, therefore prayed a discharge of the Superfedeas.

On the other side it was objected that the Assignment was void being made after Backwell's death.

The

The Lord Keeper North. If I erred in granting the Superfedeas I can discharge it. 2dly. But if some Creditors obtain a Commission and receive satisfaction, I can at their request supersede the Commission, if none other Creditors appear; I am not bound to call them in, else it were mischievous, therefore ordered the Commission to be brought in and the Assignment, if the Assignment be well, I can, &c. Try that at Law.

Davis *contra* Weld. 22 June, 1683.

Necessity.
Conveyance.

Marriage Settlement on the Plaintiff and Wife for life, the Remainder to Trustees for the life of Davis in Trust to preserve Contingent Remainders to the 1st, 2d, &c. Sons, &c. in tail: They were married eleven years, had no Children, and Davis had not the Portion of 1000 l. paid, and was in debt 4000 l. by that and other occasions; the Estate settled was alledged to be 600 l. per Annum, and the Bill was against the Remainder-man for life to joyn in Sale of some part which also could not be done, and also the Father and Mother eaten out with the Debts, driven to great want, and Presidents cited where it had been done.

Lord North. I cannot justifie to decree a breach of Trust; if it hath been done it was it may be when Recompence was made; and at last ordered Presidents to be lookt into.

Prideux *contra* Gibben. 23 June, 1683.

Devisor not
seised.

A Mery on treaty of Purchase for Lands with Pollard, Articles were made and Pollard to convey to Amery Lands called Rawson in Fee; Amery makes his Will in writing, and deviseth in general words, All his Lands to be sold for payment of his Debts and Legacies; After Rawson is conveyed to him, and he after levies a Fine, and the Lord Chancellor pronounced a Decree that the Lands were well sold though the Devise general and the Devisor not seised at the time of the Will made, nor no new Publication of the Will being for payment of Debts; and said, that if a Man devise all his Lands for payment of Debts, and after purchase Lands, that he would decree a Sale although there be no precedent Articles.

John

John Robinson and Fawknor Plaintiffs, in a Bill of Review against Nathaniel Noel, and other Children of Martin Noel deceased, on the first Bill exhibited by the said Children.

The Case was.

That Martin Noel being seised in Fee of the *Barbadoes.* a Plantation in Barbadoes, by his Will in writing, *de. 2 Ventris 358.* devised the same to Robinson and Theodore Noel, who dyed an Infant, and made Robinson and Theodore and James Noel, two of his Sons, Executors, and appointed Robinson to manage the Plantation and died; the Executors proved the Will; the Bill chargeth that Robinson was to supply the said Plantation during the Plaintiffs Minority, and to answer the Profits to them, it being for their Maintenance, and chargeth that by the Will the Plantation was devised to the Plaintiffs, and the said Theodore since dead; and the Bill prayeth an account against Robinson although he had assigned to Fawknor, and leased to one Warsam for years at a certain Rent, and yet had assented to the Legacy; for he made a Lease of the said half of the Plantation, reserving the Rent to himself in trust for the Plaintiffs, and they pray an Assignment of the Term and account, Theodore and James being dead and the Plaintiffs their Administrators.

The Defendant Robinson confessed the Seisin of Martin Noel, the Father, and that by his Will he devised the same to him and to Theodore and to James, but denieth himself chargable to the Plaintiffs. *Quare, if in Fee!*

1st. Because by the Law and Custom of Barbadoes Plantations though in Fee are not to go to the Heir nor Legatee till Debts paid, and that the Testator was indebted to others and to himself in great Sums ultra the value of the Plantation, and mentions the Sums, and that he not being appressed at the time of the Lease of such Law or Custom of the Barbadoes, made such a Lease and Reservation of the Rent, but that he made the Lease as Guardian and Trustee for the Plaintiffs the Children, and not as Executor, and therefore it cannot be taken as a disposition as Executor, or assent to a Legacy.

The Lord Keeper decreed for the Plaintiff.

A

D E

D E

Term. Sanct. Mich.

Anno Regis 35 Car. II.

In

CANCELLARIA.

Lord Ranelagh contra Hayes.

Covenant to
save harmless
decreed.

H Ayres covenants to save the Lord Ranelagh harmless touching three parts of a Farm assigned to Hayes by the Lord Ranelagh, & sue quia damnify. Decreed by the Lord North to save harmless, and a Master to tax Damages: But it was much opposed by Mr. Keck, because a Covenant is not to perform any thing in specie, and a Master in Chancery to tax Damages instead of a Jury, and the Plaintiff hath remedy at Law, and not here.

And Nota, the Breach assigned was, that the Plaintiff was sued in the Exchequer by the King for Rent, but it was not charged in the Bill here, or proved that the Rent was behind, but only that he was sued, &c. and objected that this would for every petty Breach subject the Defendant to Commitment.

Howard

Howard *Vid. contra* Harris & Robert. 6 Nov. 1683.

THE Bill was against Harris and Robert to redeem two Mortgage. Mortgages made to Harris by Henry Howard late Husband of the Plaintiff, and Brother of H. Heir to Harry; the Bill charges the Mortgages made, and that there was some Agreements for Redemption, if not expressed in the Deeds, yet was to be redeemed and charged that she was Jointressed on Articles made before Marriage, executed after by reason Howard, the intended Husband, was then an Infant, but at full Age made a Jointure to the Plaintiff, and offers to pay the Mony, so she may be admitted to redeem; Robert consents to her demand; Harris denies the Articles and sets forth that as to nine Tenements he was a Purchaser for valuable Consideration 1600 l. from Sir Robert Howard, and after two Mortgages made to him, the last Mortgage including the first, and redeemable on payment of 1000 l. the nine Tenements in Lease for three lives yet in being.

The Case came now to be heard, and on the Pleadings and Proof was, viz.

Sir Robert Howard in 1651. by Fine and Deed produced and proved, conveyed the nine Tenements in Reversion after three lives yet in being, and whereon 7 l. 10 s. was reserved to Harris and his Heirs. Anno 1665. the (Sir Robert was then dead) married Henry; 1671. Henry in consideration of 1000 l. mentioned in the Deed to be paid, conveyed Lurkin and other Lands (the nine Tenements are no part of these Lands) to the Plaintiff for her life for her Joynture (Quære if not for part of her Joynture) and after in June 1671. conveyed the nine Tenements in Reversion to him in fee, but not to be redeemed but by Henry and the Heirs Males of his Body and by no other, which by his Answer he saith was done so, because of the injury Sir Robert had done him; for now one Berry then Husband to the Plaintiff, had set on foot a fraudulent Conveyance made by Sir Robert and his Brothers, whereby Berry pretended that Sir Robert was but Tenant for life, and so the Conveyance of the nine Tenements was void which induced Harris to consent, for thereby viz. by this Mortgage and his Conveyance he still kept possession, and received the Rents 7 l. 10 s.

A 2

After.

Afterwards having his Money 564 l. secured by this Mortgage, Henry Howard had need of more Money, and Harris supplied Henry Howard with 436 l. more which made the debt 1000 l. and took a Mortgage anno 1672. of the same Lands (the nine Tenements in Reversion as aforesaid) and of divers other Lands to him and his Heirs redeemable only by Henry Howard, and the Heirs Males of his body; but in this Conveyance (Quære, if not in the former Mortgage also) Henry Howard covenants to pay the Interest duly every half year, and the 1000 l. in Anno 1686. Afterwards in 1673. Henry Howard conveys Hopfel and Aston, which are the nine Tenements, and divers other Lands to the Plaintiff for life for Jointure, the Remainder to himself and the Heirs Males of his body, or to that effect, the Remainder over, under which Robert the other Defendant claims; but as before is said, the Plaintiff till this Conveyance had no title to the Land in Hopfel, &c. the nine Tenements.

Mortgage redeemable by Mortgagor and Heirs Male.

For the Plaintiff, Mr. Solicitor, Mr. Keck and others insisted that both Conveyances being with power of Redemption by Henry Howard and the Heirs Males of his Body ought in Equity to be not so restrained. A Mortgage can by no Act or Clauses be so restrained, but the Mortgagor and his Assigns of the Equity of Redemption or his own Heirs, though not of his body, may redeem, else it would lie in the power of a Scrivener to make all Mortgages absolute in effect, and to put a bar to the Power and Jurisdiction of this Court to relieve in Cases of Mortgage by inserting such a Clause.

Mr. Keck cited a President 1678. between Killington and Green. The Condition of a Mortgage was to redeem during the life of the Mortgagor. Decreed that the Heir might redeem.

2dly, The Covenant on Henry Howard his part to pay the Money and Interest makes it a Mortgage on Harris's part, and he might sue for the Money, and it cannot be a Mortgage, but it must be a mutual Mortgage equal to both.

On the other side it was said, that generally it is true, that no restraints could be put on a Redemption where the business is only lending of Money by the one, and securing the Money lent by the other; and therefore if the
Case

Case were only that Harris had lent, &c. and Howard had made a Mortgage redeemable by him or his Heirs Male, &c. his Heir general or Assignee might redeem; for securing the Money is the main of the business, but this is not the Case as to the nine Tenements; for it is alledged and proved Sir Robert Howard had long before the Jointure, viz. 1651. absolutely and for a full Consideration by Fine and Deed sold those Lands to the Defendant, viz. the Reversion and Rents 7 l. 10 s. and Harris in possession of the Rents before and till the Jointure made; and the Consideration of the Mortgage 1672. to him by Henry Howard was the precedent Title from the Father of Henry. If it had been so plainly said, that for that reason and because he would only redeem, and so his Heirs Males, it would have been a good restraint, that he and his Heirs Males might have liberty to set on foot his pretence, but no other. If A. in breach of Trust vested in him for J. S. should convey the Lands to B. and B. being intituled under a breach of Trust, conveyed to J. S. on Condition, that he and the Heirs of his body may redeem. B. dyed without Issue, shall his collateral Heirs redeem, and so as that J. S. should be forced to convey not only the Interest he hath by the Mortgage, but extinguish his ancient title; for so it is desired here, that Harris should convey to the Plaintiff and so lose his former title, for which he paid so much, and hath no consideration for it; for his lending of Money to Howard is no consideration to Harris to lose his Purchase and his Money which he paid for it.

Again, Harris did really purchase from Sir Robert, it is not alledged or proved how Henry Howard comes to be interested, or what title Henry Howard had; it is not said so much as in the Bill that Henry Howard was seized of any Estate in Fee or otherwise, but abruptly that he made such Jointure and Mortgage, and pays the Conveyance, paying the Mortgage Money.

The Defendant sets forth a Purchase from the Father by Fine for valuable consideration. Now if you will have a Reconveyance and redeem, you must shew why the Conveyance to the Defendant is not good by shewing a former title to the title of Sir Robert the Conizor of the Fine, or invalidate his Conveyance by some matter, and not only by Replication aver your Jointure; else if a Man take a Mortgage of his own Lands and lend Money he shall lose his Land for his own Money, viz. for nothing.

The

Interest on Interest.

The Objection on the Covenant can press no further than as to the other Lands, where the Defendants Title is only the Mortgage.

The Portion the Plaintiff brought is but 1000 l. both her Jointures are near 1000 l. per Annum.

The Lord North, Lord Keeper, decreed the Redemption, but on payment of the Money, and Interest on Interest; and took a Difference where the Covenant is to pay the Interest and where not, for debt lieth on the Covenant.

Lyford *contra* Coward. 6 Nov. 1683.

Surrender decreed according to Possession.

THE Bill was for a Decree of certain Copyhold Lands, parcel of the Mannor of Buckeridge in the County of Berks, and his Title is by a Surrender made long since by Richard Lyford, Father of the Defendant Mary, to the use of his Will, under which Will he claims, because all the Rolls are lost or detained by Blagrove Lord of the Mannor, and inforces that the Surrender is to be presumed because that he had been in possession 40 years, and done Suit and Service to the Court as a Copyholder. Blagrove the Lord denies having any Rolls: The Defendant Mary denies both the Surrender and Will, and that she was but three years old at her Father's death, whose Heir she is, and since a Feme Covert, and therefore no Labces can be imputed to her, neither in Law nor Equity; and being an Infant did not discover her Title, but lately being Heir to her Grandfather, who made the Will; and for trial of her Title hath brought a Plaint in the nature of a Writ of Ail, as Heir to her Grandfather, viz. Daughter and Heir to Richard, Son and Heir to Richard, who as is pretended made the Will and Surrender.

Writ of Ail.

At the Hearing the Plaintiffs made no proof of the Surrender and Admittance, but proved that he had served several times as a Copyholder at the Court, and produced a Note under Sir Edward Powell's hand of a Receipt of Money for his admittance; but to what Estate he was admitted

mitted, does not appear. It was also insisted on, that the Plaintiff had paid several Legacies given by the Will; but this was but lightly insisted on at this hearing, (but mainly on the long Possession) because there was Assets enough to pay the Legacies, and the Legacies were personal, nothing at all relating to the Lands.

The Defendants Council answered: The Possession Possession no concluding Evidence against an Infant and Feme Covert. against an Infant and Feme Covert, was no concluding Evidence, especially against an Heir to support a voluntary Conveyance against an Heir at Law, who had but this Land left her, being but 4 l. per Annum. Whereas the Plaintiff had a great Estate from the Grandfather: And insisted that the Bill was founded on matter merely triable at Law, whether Will or no Will, Surrender or no Surrender.

But the Lord Keeper insisting much on the Possession as ground to make a Decree for the Surrender;

The Defendants Council replied, That by the Statute of 32 H. 8. a Writ of Ail is allowed to be brought upon a Seisin within fifty years: And tho' in some Cases the Court has decreed Settlements without trial; yet that Limitation. Possession. was always where the Bill was founded on some matter of Equity properly and peculiarly, finally to judge, as where a Trust is built upon a Conveyance, or the like; and the last Judgment is in this Court, which here is not so: And if the Plaintiff thought an inferior Court not capable enough to try the Point, if the Defendant did consent to try it in an Ejectione firme, or otherwise as the Court should direct, which is all the Equity the Plaintiffs could have here.

But the Lord Keeper, tho' much press'd to the contrary, decreed the Surrender, and left the Defendant to try Will or no Will.

Ratcliff *contra* Graves. 7 Nov. 1683.

An Executor
lends and re-
ceives Interest.

AN Executor liable to Debts and Legacies payable in futuro, and having Money of the Testators in his hands, lends it at Profit, and receives it and the Profit, or Interest thereof. The debate was, whether he shall answer the Interest he received as Assets: Lynch's Case, and other Cases, ante; and the Case of Mr. Cartwright in this Court, (where it was decreed, That the Executors should not be charged, and affirmed in an Appeal in Parliament) were cited; and the reason given then, and now given, because the Executor not being bound to lend, &c. if he do lend, 'tis at his peril; and if it be by that occasion lost, he shall answer the same out of his own Estate: And therefore as he shall bear the Loss, he shall have the Gain.

The Lord Keeper remembered Cartwright's Case, for he said he did not like that Case, for saying also that when the Executor lent it on Security, he might secure himself for a small matter.

Finch Solicitor. My Lord, the Security so taken may fail.

Keck. It hath been taken here as a Rule that the Executor shall not be charged.

Yet now the Lord Keeper decreed the Executor should be charged.

Lease waiting on
the Inheritance,
if Assets, &c.
Assets.

Vid. Hardres
Rep. accord. by
Hale in Sir
George Sands
Case.

Nota, Also that this Term he declared, that where a Lease for years is to wait on the Inheritance; That it shall be Assets as to Debts as well where the Interest of the Lease is in the hands of a Stranger, and not in the Owner of the Inheritance, as when it is in the Cestuy qui trust, of the Inheritance, and the Interest of the Inheritance in a strange Trustee.

Nota, Contrary to former Resolutions.

Lord

Lord Ranelagh contra Thornhill. 17 Nov. 1683.

Bill of Review to reverse a Decree for Money on account by the Master, whose Report was decreed: ^{Interest.} The Error alledged was, that the Master had allowed Interest upon Interest, for having made a total of divers Sums paid by Thornhill, and Interest for them. The Master then added other Sums after paid, and then cast up the former total, which was compounded of Interest and Principal, and in the latter allows Interest for the first total, &c. and the Lord Ranelagh being summoned to attend, refused or neglected, and moved to be heard; but because not proper to be moved after a Decree, not allowed by Motion, but now directed to be examined and rectified as to that point, but the rest of the Decree to stand.

Harding, and others, contra Marsh, Langley and others. 19 Nov. 1683.

On Commission against Peacock a Bankrupt, sued out by the Plaintiffs: A Distribution was made of 370 l. to the Plaintiffs; after the Plaintiffs in two Suits at Law prosecuted by them, were non-suited in one, and a Verdict against them. Which Suits were to have recovered 600 l. part of the Bankrupt's Estate, and then they exhibited a Bill in Chancery, and there were dismissed, because, Bankrupt or not, was only triable at Law; then they sued at Law, and had Judgment, and also Execution for 600 l. Then Langley a Creditor prays to be admitted in, and tenders Charges of the Commission, and that he may be admitted to partake in so much of the 600 l. and other Estate, ultra and beyond what was already distributed. The Commissioners admit him, and call the Plaintiffs to account; which they refusing to do, the Commissioners sue the Plaintiffs on a Covenant which the Plaintiffs had given to the Commissioners, as is usual.

Bankrupt after Distribution, and 4 Months, other Creditors may come in, but must not disturb the former Distribution.

The Plaintiffs now sued to be relieved against the Covenant on two Reasons:

£

First,

First, That after the four Months elapsed and Distribution, no Creditor can come in.

Secondly, They had spent in the Suits 900 l.

The Cause was now heard: The Defendants Counsel argues, that it was true that Langley could not come in to disturb the first Distribution, but might come in for the residue of which no distribution was made; for in that the first Creditors had no more Interest than the Defendant, and there are no negative words in 21 Jac. which makes the restraint: But as to what is distributed by the precedent Law, 13 Eliz. All Creditors, whether they sue out the Commission or no, might at any time come into the Commission; for by that Statute each Creditor is to have his Proportion, pro rata, out of the Bankrupts Estate, which made the Execution of the Statute in point of Distribution, uneasy and difficult, because it was hard to find out all the Creditors: And on the other hand, it was too great a Power in the Commissioners by that Law; because the Commissioners might have the next day after the Commission, or as soon as they pleased, sell and dispose of the whole Estate: To obviate which, 21 Jac. gives remedy, and the words in that Statute, (before Distribution) must not be understood of the Estate that is not distributed.

As I was about to argue that point further, (it having been alledged at the Bar that Langley's demand was vain) for nothing could come to him if he contributed to the Charge the Plaintiffs had been at; for the Estate to come in, viz. the residue, would not be beneficial to him, 600 l. only is recovered, out of which 300 l. and 170 l. being deducted, 130 l. remained; and if their Charges in Recovery were allowed, nothing would remain.

But Mr. Keck, of Counsel with the Plaintiffs, acknowledged the Defendant was to come into the Commission paying the Charge.

The Lord Keeper referred the Account of the Charges to be specially reported by the Master; for Langley insisted that he had born 200 l. in charge with the Plaintiffs, and is to be but at charge of the Commission, not of the Suit; for the Recovery is to their own use, viz. the 470 l. not of unnecessary Suits, where also they failed.

Lampen *contra* Clowbery. 19 Nov. 1683.

William Clowbery by his Will gave 2000 l. to the ^{Devise.} Defendant; Item to the Daughter of the said O. Clowbery when she shall attain her Age of 21 years, or be married, which shall first happen, the Sum of 500 l. to be paid her, with Interest. The Testator died, the Daughter Legatee, died under age, unmarried. O. Clowbery her Father, her Administrator, sued and had a Decree for the 500 l. and Interest thereof, to be accounted from the death of the Testator; and Lampen (against whom the Decree was) being Executor, &c. brings a Bill of Review.

Where on debate, the Difference was allowed by the Lord Keeper, between a Devise of 500 l. to one to be paid at her age of twenty one, or married, there it is due, tho' she died before twenty one; and where 500 l. is devised, if, or when she comes to twenty one.

The Point being a mere point in Law, was long debated.

Mr. Solicitor argued, that because Interest is to be paid, therefore the Principal must be due; and said that the words transposed are 500 l. with Interest, to be paid at twenty one, had made it plain, and the Interest must be intended for maintenance of the Child in the Interim.

E contra it was said, that this is contrary to the words, which cannot bear that sense without Violence; and 500 l. and the Interest, are by the Will to be paid at twenty one, or Marriage, not before twenty one, &c. And he meant it, that the Interest computed, viz. from his death, should be paid for her Portion; and this is best suitable, and stands with the words and is rational; Mantira, &c. l. 6. c. 14. In Testamentis ratio tacita non debet considerari, sed verba solum spectari debent. Multa possunt movere mentem Testatoris quæ nos latent. Ideo, per divinationem mentis durum est a verbis recedere.

The Lord Keeper once pronounced a Reversal of the Decree; but being much pressed, that the intention of the Testator would be clear in the Proofs, he declared he would suspend the Decree, and hear their Proofs.

----- *contra* Langton. 24 Nov. 1683.

Mortgage.

Mary ----- lent 700 l. and took a Mortgage of Land called Sison, for a thousand years, in the name of her Brother, and afterwards did purchase the Inheritance in the name of a third Person, and the Lease was assigned to her; she died Intestate, and her Mother took Administration: The question was touching the benefit of this Lease; the Heirs to her (her Sisters) claimed as Heirs against the Administratrix.

A Difference was taken at the Bar, viz. that if Mary had been first Purchaser of the Fee, and after purchased a Lease, it should wait on the Inheritance, and the Administrator or Executor should not have or keep it against the Heir; but here the Lease was first in her.

Lease.
Heir.
Executor.

Lord Keeper. There is no difference in Reason, and therefore dismiss the Plaintiff as to this point; and that the Heirs were to have the Lease to attend the Inheritance.

Wagstaff *contra* Read. 20 Nov. 1683.

Purchaser not
hurt in Chan-
cery.
Bankrupt.

Portman became Bankrupt, the Commissioners assign his Estate, whereof the Plaintiff made title to some Goods, and exhibits his Bill against the Defendant to discover the Goods, and their value, and what and how much he paid for them, because as the Plaintiff charges, they came to the Defendant's Possession after the Bankrupt broke: The Defendant sets forth, that what Goods did ever come to his hands, he bought of Portman bona fide, for a full and valuable Consideration, nor did not know, nor had any notice that at the time of buying until the now Bill, was a Bankrupt, or of any account of his Bankruptcy, and pleads this matter against any discovery.

After long debate the Lord Keeper seemed to incline, that the Defendant being a Purchaser without notice, should not be prejudiced by this Court: But on the other hand, if the Sale were at extream under value, as for 5 s. or the like, then such a general Plea shall not stand; for then the Plaintiff should be disabled to disprove, and
any

any Man in the like Case should be protected; therefore let the Defendant set forth what the Goods were, or what he paid for them.

But the Defendant's Council objected, that would destroy and prejudice the Purchaser, though he paid the full value; for if he discovers what he paid, the Commissioners will assign the Money, or if he discover the Goods, the Commissioners will assign them; and so the Court shall be instrumental to wound the Purchaser. If the Plaintiff can help himself at Law by the aid of the Statute, he may, and the Court will not hinder him, but not aid him here: The difficulty to avoid this Mischiefe, on either side held long discourse, and at last ended, that the Defendant should answer what and how much he paid; so as the Plaintiff did consent to take no advantage of the discovery, but here in this Court, and not at Law: Which the Plaintiff consented unto by his Council, and was to subscribe his Consent, with the Register, and then the Defendant was to answer.

Defendant to answer, but Plaintiff not to take advantage thereof at Common Law.

Osborne *contra* Chapman.

THE Defendant, as Guardian to the Plaintiffs Wife an Infant, had managed her Estate; and on the Treaty of the Plaintiff for the Marriage with the Wife, desired Account, which was given him: Whereon he and his Council advised three or four days, and then 800 l. was found due to the Wife, which the Defendant by three several Bonds secured to the Plaintiff; and the Plaintiff gave a Bond in 1400 l. to the Defendant to release all Accounts to him, after the Marriage which was had, and the Defendant paid the 800 l. according to the Bonds; but the Plaintiff gave no Release, but now sued to have an Account, and relief against the Bond: But the Defendant insisted that his Agreement to make Release proved by the Bond given by him, and by his acceptance of the Money secured by three Bonds; after the Marriage was had he now ought not to have Account.

Lord

Lord Keeper. He accepted of no Money but of what was due to him; and the Account was made before Marriage when he had no Title, and there is no Release made as there was in the like Case by Bassett, which bound Bassett, and the Plaintiff greatly favoured in the Accounts, and the Marriage was but one year since, and the Plaintiffs pursuit is fresh; therefore answer the Bill.

D E

Term. Sanct. Hill.

Anno Regis 35 & 36 Car. II.

In

CANCELLARIA.

Bonham *contra* Newcombe & Ux. 25 January 1683.

THE former Decree, ut supra, fol. pronounced to be reverſt by the Lord Keeper North on Precedents cited and long debated: But order to ſpend, &c. and he would hear the Cauſe ab origine: He diſliked alſo the Entry of the Decree, viz. rectifying the Bill and Answer; and reading the Proofs, and hearing Council, decreed it a Mortgage; and therefore not ſtating the Point of Fact, viz. that it appeared thus or thus, &c. And ſo he did lately in the Caſe of the Counteſs of Angleſey.

Hobert *contra* Hobert. 26 January.

THE Suit was to avoid a Conveyance by Fine and Fraud. Deed to lead the Uſes of the Fine Twenty three Years ſince, on ſuppoſition of Fraud, purchaſing the Fee of the Land for 11 l. worth 60 l. per Annum; the Plaintiff ignorant of the value, but the Defendant well apprized thereof; and the Plaintiff ignorant alſo of his Title, which he came to the notice of after the Fine. The Bill was diſmiſſ.

The

The Lord Keeper declared that if one will seal a Release or other Assurance, to one in Possession, for never so unequal Consideration, it shall not be relieved, because of a new Title discovered, unless there be some special Fraud; as if A. having title, and B. in Possession; B. conveys the Land to A. in trust for B. and then gets A. to convey the Land to him as in Execution of the Trust, whereby A. extinguisheth his Title, &c.

Holby *contra* Holby.

Dower.
Judgment.
Equality.

THE Defendant recovered Dower against the Plaintiff an Infant; one appeared for the Plaintiff, then Tenant, as her Guardian, being her Grandfather, but Father to the Defendant, then Demandant in the Writ of Dower, and suffered Judgment, for he could do no other; but the Dower was unequally set out by the Sheriff, but the Sheriff not culpable of any Fraud: But great Inequality appearing;

The Lord Keeper declared, that the Plaintiff ought to be therein relieved.

Whereupon a Proposition was made by the Plaintiffs Counsel, that either the Plaintiff should set out the whole in three several parts, and the Defendant choose one part for her third, or if the Defendant would set them out, and they choose two.

Rich *contra* Rich.

London.
Orphans.

IN debate, agreed by the Council, and not denied by the Court, that a Lease for years waiting on the Inheritance of a Citizen, shall not be reckoned as a Chattel, to be divided among Children by the Custom.

2dly. It was certified by the Recorder, that if a Citizen convey to a Child Inheritance, tho' it be expressed for advancement, it bars no Child's part; but such Child may come in for a share, &c. with the rest.

3dly. It was debated, whether if a Citizen marry a Daughter, and give Dower with her, and she desire to come in for a share, whether she shall be admitted if the Father do not in writing declare her advanced; and the Sum, as in Inds Law temp. E. 6. or whether she shall not come in?

Lord

Lord Keeper. I regard no By-Law in the Case.

Churchill. The Precedents are many, that unless the Father do declare her unadvanced, she shall come in: We ground not on any By-Law, but the Custom, which presumes in such Case a full Advancement, unless the contrary appear.

Anonymus. February 1683.

A Bill was exhibited for discovery; the Defendant Plea. pleaded, that he was a Purchaser for valuable Con. Notice. sideration, viz. so much, &c. and that he had no notice of Purchaser. the Plaintiffs Title, &c.

Ruled by Lord North, that the Plea as to not having notice by way of Plea, was not good; but it ought to have been as to the notice by way of Answer, and not by way of Plea, on debate; but yet that the Defendant being a Purchaser, should not lose by the Formality of Pleading the benefit of his Plea if he should answer the whole Plea; for if he should answer to the time of his Purchase, which possibly was in fact, after the Plaintiffs Purchase, (they were indeed both of them Mortgagees) then the Plaintiff might wound him at Law; he should put in a new Plea, and put in the Point of notice by way of Answer, or to that effect was the Order.

Broad *contra* Broad.

A Bill of Review on the Decree was brought to hear. Decree. ing the 22d of Feb. 1683. and the Decree was read Form of entring. and Objections made against it. A Decree.

1st. That the Decree was founded on a Trust, arising on an Agreement by the Husband; but the Decree mentioned no such Agreement, but recites it in recital of the Plaintiffs Bill, and then proceeds to recite the Answer, and then proceeds to the Decree on this manner: Whereupon and reading the Proofs, the Court decreed the Trust and Redemption, but doth not say that such Agreement was proved: Therefore the Plaintiffs Counsel insisted, that the Decree was made on the Bill and Answer.

P

M.

Mr. Solicitor and others said that it was the Course, and a hundred Decrees were so; and when it is said on reading the Proofs, it is decreed, it is intended that the Matters put in issue are proved.

But e contra it was said, that a Decree ought to be grounded on Fact, ex facto jus oritur, and else by the Clerks Course the Defendants should be bar'd of a Review in all cases; for the Plaintiff in Bill of Review cannot alledge Matter of Fact contrary to what is stated in the Decree to be proved; and it may be many Issues are joined in the Bill and Answer; if this course should hold, all must be admitted, and no Man can truly know on what fact or case the Decree was made, nor any Appeal brought.

The Lord North declared accordingly, and was clear of opinion, that it was not enough to say (on reading the Proofs) it is decreed, but on reading the Proofs, it appeared thus and thus, and therefore decreed, &c. And on this reason said, that he took no notice of the Agreement; but yet affirmed the Decree, because when the Wife joined in the Fine, sur concessit, of her Jointure, in order to a Mortgage or Security, it was not an absolute departing with her Interest; but there resulted a Trust for her when the Security or Mortgage is paid, to have her Estate again, as if it had been a Mortgage on condition, and the Money paid at the day.

D E

Term. Sanct. Trin.

Anno Regis 36 Car. II.

In

CANCELLARIA.

Anonymus.

SIR John Churchill shewed that a Sequestration for Sequestration against an Infant of Seven years : Several ill and beg-
 garly Fellows as Sequestrators, by colour thereof Lord for not appearing.
 received the Rents of the Lord Anglesey, and certified the demand of payment of others ; A. B. C. &c. Tenants, who refused to pay their Rents ; whereupon an Injunction issued against A. B. C. &c. to pay their Rents to the Se- Sequestrators receive Rent.
 questrators, and some Tenants were imprisoned, of which he complained, and said, the Lord Anglesey present in Court, the Tenants dwelt in Cornwall, and it were hard they should be forced to come to London. At last the Lord Anglesey offered to appear for them ; and if so, and the Contempt in the Tenants did not appear, Cost to be awarded.

Nota, The Process of Injunction was not against Tenants of the Lord Mohun, but A. B. C. &c. by name.

Infant sent for
into Court.

Sir John Churchill said a Messenger of the Court should be sent to bring in the Infant, and when he comes in, the Court shall or may assign one of the Six Clerks as a Guardian to appear and answer, &c.

Lord Keeper. How will that look in the Lords House, that an Infant Peer shall put the defence of all his Estate in a Six Clerk, who knows nothing, and cannot be informed by the Infant of his Estate, &c. At Common Law the Parol was to demur, and the Infant is not bound to answer till full age: And Execution of a Judgment for debt against the Ancestor cannot be against the Infant Heir; and by Act of Parliament the Execution of a Statute is not against an Infant, for the Register, Parliament and Common Law gave no Execution against an Infant Heir, altho' the debt were clear and indisputable, viz. Judgment, or by Statute.

Pet e contra is done in Chancery.

Hatton *contra* Gray. 14 June 1684.

Agreement by
Note tho' signed
but by one, yet
good.

Hatton sold Houses to Gray for 2000 l. Note was made by Hatton of the Agreement. signed by Gray but not by Hatton.

Mr. Solicitor. The Note binds not him who signed it not, for the Statute of Frauds and Perjuries, &c. and therefore in Equity cannot bind the other Party, for both must be bound, or neither of them in Equity.

But decreed contrary.

Anonymus. 1684.

Mortgagor bor-
rows more Mo-
ney by Bond, the
Heir shall not re-
deem without
paying it.

Mortgagor borrows more Money of the Mortgagor, and gives Bond for it; the Heir of the Mortgagor shall not redeem without also paying the debt by Bond, if that the Mortgagor bound himself and his Heirs in the Bond.

East-

East-India Company *contra* Interlopers.
29 June 1685.

THE East-India Company had a Verdict against Interlopers, who in breach of the Charter traded; but the Company not being otherwise able to discover the Particulars of the Commodities, &c. and Damages, exhibited a Bill of Discovery: To which the Defendants gave insufficient Answers, and so reported by the Master; and the Plaintiffs title being found good at Law, and that their Patents were good in Law to exclude others from trading into those parts, they now prayed an Injunction against the Defendants, to stop certain Ships which the Defendants were setting forth to those parts, to trade in further breach of the Patents: And so the like was done formerly in Case of the Printers for Importing Bibles.

Injunction to
stop Merchant
Ships.

Lord Keeper. The Case is of a great Consequence; if it be to stop Actions on insufficient Answers, but to forbid plowing or trading, or the like, I cannot, but will advise.

Vid. Ant. Stationers Case.

No Injunction to stop trading.

Bond & Ux. *Administratrix* of Elizabeth, Daughter of Mary the former Wife of Thomas Brown.

The Case.

Iohn Brown, the Great Grandfather of Elizabeth, John her Grandfather, and Thomas her Father: Thomas was seized of the Lands, &c. in question; and they all by Fine and Recovery settled the Lands in question to the use of Thomas for life, the Remainder to Mary for life for her Jointure, Remainder to Stulford and other Defendants, for 99 years, the Remainder to the Issue Male of Thomas in tail, Remainder to George Brown in tail, &c. The Settlement was in consideration of Marriage of Thomas with Mary the Plaintiff, and 2000 l. Portion. George Brown, on whom the Remainder was settled, was a remote Kinsman, viz. Son of George the Son of John, Father of Thomas. The Marriage took effect, and the Portion paid.

Portion given to
be paid at 21, or
Marriage.

The Daughter
dieth, her Admin-
istratrix sueth.

The Term was by the same D^{cd}, which declared the uses, declared to be to raise out of the Premises 2000 l. for the Daughter and Daughters of Thomas by Mary, and Maintenance

tenances yearly not exceeding 20 l. per Annum, if one Daughter 2000 l. and if any Daughter died, the Survivors or Survivor, if more Daughters than one, to have the part of the Daughters dying: viz. If Thomas die without Issue Male, or having such Issue Male by Mary, if such Issue should die in minority or unmarried, the Trustees should out of the Premises raise and levy 2000 l. for the Portion and Portions of such daughter and daughters, together with a competent yearly Maintenance for every such daughter and daughters, not exceeding 20 l. per Annum, and the 2000 l. to be paid at 21 years or Marriage, which should first happen. Proviso, if the said Thomas Brown in his life-time, or any to whom the immediate Remainder, &c. should appertain, should within 12 months next after the death of the said Thomas Brown, without Issue Male by the said Mary, either pay or secure the same, and the said Maintenance to the liking of the said Trustees, then the said Term to cease. Thomas died, having a Son, who died without Issue; Elizabeth his Sister then living, and many years after, till she was 19 years old, and then died: Mary the Mother took Administration to Elizabeth, and the Bill was to have the 2000 l. and the 20 l. for so many years as Elizabeth lived, for George in Remainder had entered and received the Profits, but not paid the 20 l. nor maintained Elizabeth.

The Lord Keeper decreed for the Plaintiff as to the Maintenance, notwithstanding that her Grandfather John had by his Will given the said Elizabeth 2000 l. so as she needed not Maintenance; but as to the 2000 l. dismissed the Bill.

D E

Term. Sanct. Mich.

Anno Regis 36 Car. II.

In

CANCELLARIA.

Whitmore *contra* Lord Craven, & *al.*
December 1685.

VV Illiam. Whitmore having Issue only one Will.
Son, made his Will in writing, and Executor,
thereby devises several Legacies; and
after wills in this manner, viz.

The Surplusage of my Personal Estate, my Debts, Legacies, and Funeral Charges being paid and satisfied, I give unto the Right Honourable William Earl of Craven, for the use of my only Son William Whitmore, and his Heirs lawfully descended from his Body; and for the use of the Issue Male and Issue Female, descended from the Body of my Sisters Elizabeth Weld deceased, Margaret Kymish and Ann Robinson; in case that my only Son William Whitmore should decease in his minority without having Issue lawfully descended from his Body, I nominate and appoint my only Son William Whitmore Executor of my last Will and Testament; I nominate and appoint the Right Honourable William Earl of Craven, during the minority of my only Son William Whitmore, Executor of my last Will and Testament. And commends and commits the Education and Tuition of his Son to the Care of the said Earl.

In

In the year 1678. the Testator died, his Son being then about the age of 13 years. The Earl of Craven proved the Will and paid the Legacies; and the residue of his Personal Estate consisted for the most part in Cattel, Household Goods, Plate, Jewels, Arrears of Rent, and Debts upon Bond; the Mortgages being not considerable.

William Whitmore the Son is lately dead without Issue, being above the Age of 18 years, and under the Age of 19, and had never taken upon him the Executorship to his Father.

That William Whitmore the Son a little before his death, made his Will in writing, and thereby devised to his Wife all his Estate, real and personal, and what else he could give her, and makes her Executrix.

The Widow sues for the Estate and Surplusage; the Sisters Children exhibit a Cross Bill for it: Dec. 1685. both were heard.

The Questions were two:

Term.
Remainder.
Devise.

1st. Whether the Devise of the Surplus to the use of the Children in case that William the Son did take effect, is good in Law? Because it is to them in case William die without Heirs of his Body during his minority; for the Defendant pretended that though a Term or a Chattel given to one, and the Heirs of his Body; and if he die without Heirs of his Body, yet when it is so given on a Contingency to happen in a short time, and which is to happen at farthest on the death of one person, it is good that the Intention of the Will may be performed; and Maslingbord's Case and that of the Duke of Norfolk cited. But e contra it was said, That though that may be true in case of a Chattel real, it cannot be in case of Money, or personal Chattels, which once vested. (as here in William the Son) can never be divested, never any such Precedent was, or can be; the Inconvenience would be great, and in the case of Term or Chattel real, it was long ere it was allowed, and the use of money is the money it self.

At what age an
Infant shall be an
Executor.

2dly. For the Plaintiff, that if it be a good Devise, yet the Contingency never happened; for William must die during his minority, or else the Defendant can have nothing, and minority is not 21, but 17 in case of Executorship; and minority in the first part of the Will is of the same Sense as the word minority is in the latter part; the same word in
the

the same Will is of the same Sense ; and the rather because the Executozship of the Lord Craven being but during the minority of William, the Executoz ceaseth when William comes out of his minority as Executoz : William is first named Executoz, and then the Lord Craven is made Executoz during the minority of William ; that is, while he comes to be of 17 years of age, and then the Lord Craven hath no more to do. William can sell, alien, (pea) and devise his own Estate by Will ; the Lord Craven's Interest of Executozship ceaseth.

The Lord Chancellor decreed accordingly, and put the Case as if the Clause of Executozship had been in the first place, and Lord Craven named Executoz during the minority of William ; and then if William die during his minority, the residue to the Children, it were without question, and the Property at 17 vested in William, and cannot be divested ; and said that if the Case had been of small value, it had induced no debate, but now six Counsel of each side have spoken.

D E

Term. Sanct. Hill.

Anno Regis 1 Jac. II.

In

CANCELLARIA.

Newdigate *contra* Johnson.

Account.
London.

Interest.

THE Plea of an Account of an Orphan's Estate before the Aldermen of London, was disallowed, and a Surcharge allowed to be made thereon by the Lord Chancellor; who said when he was Recorder of London, he observed well the manner of their taking such Accounts: He also decreed that the Executor pay Interest at 6 l. per Cent. for the Money he had not paid into the Chamber till he paid it in, though the Chamber usually takes but 5 l. per Cent.

Greswold *contra* Marlham. *Eodem die.*

Mortgage.
Loss.
Notice

There was due to Marlham 4000 l. upon a Mortgage made to him of Lands: The Mortgagee after the Mortgage, acknowledged three Judgments to other Persons for other Monies due; two of those Persons to whom the Judgments were given, gave notice to Mr. Marlham of their Judgments, and desired him to accept of his Money that was due upon the Mortgage, which they said they were ready to pay him, and desired him to appoint a time when, and they would pay him his Money within a Fortnight, to the intent that his Mortgage being set aside they might

might take Execution on their Judgments, but proved not any money actually tendered : But afterwards Marsham exhibited a Bill against the Portgagoz, and had a Decree to fore-close him of Redemption ; and afterwards took a further absolute Conveyance from the Portgagoz, for a considerable Sum of money ; and now the two Creditors had a Decree against Marsham to pay them their money ; but Powel the third Creditor had no relief, because he gave no notice in time of his Judgment.

Comyns *contra* Comyns. *Eodem die.*

The Case was.

Several Legatees by Will, of Sums of money in Nu-
mero, others in Specie ; the Estate would not pay all, Loss.
the Question was, Whether the Loss should fall only on Legacies.
the Legatees in Numero, or whether the Specifick Legatees Contribution.
should contribute proportionably ?

The Lord Chancellor was strongly of opinion they ought to contribute ; for he said that the Intention of the Testator was as much that one should have all the money, as the other should have the whole Specifick Legacy ; and put the case, suppose three Specifick Legacies be one Horse, &c. and there is not sufficient to discharge them all by reason of debts, what shall be done there ?

E contra. It was objected that the Practice of the Civil Law, and of this Court, had been otherwise.

Chancellor. See Precedents.

Quære, In case there be three Legatees, each to have a Horse, but particularly A. the Black Horse, &c. and so to the rest, and the debts so diminish the Estate that the Horses cannot be delivered.

Quære, If there be not a Difference in such case, if the Legacies were particular, viz. the Black Horse to A. the White to B. &c.

Bodmin *contra* Vandebenden.

Dower.

THE Cause came again to be heard before the Lord Chancellor, and after long debate decreed for the Plaintiff, against the Lease for years and an old Statute, which Vandebenden had bought in: For the Lord Chancellor said he could not imagine why a Jointress should be relieved against such a Lease, and not the Widow who hath Dower; the Jointress comes in by Contract and Act of the Party; the Dower is by Act of Law grounded on Marriage, the Act of both Parties: The Wife in that Case is by Law more favoured than the Heir, and the Heir should be relieved; as if a Lease be made in trust to pay debts, the Lessor dieth, the Heir paying the debts shall be relieved against the Lease, and set it aside; and why not the Wife? I can see no reason for it: And Vandebenden could not but have notice that the Lord Bodmin was married, when also Vandebenden had a Statute of 10000 l. from the Lord Bodmin: But the Defeazance thereof appeared not.

Some of the Council insisted on it as a strong Proof, that Vandebenden had Abatement in respect of the Plaintiffs possibility of Title; Others insisted that a Lease being created by the same Settlement, by which the Inheritance was settled only on a particular Purpose, and then to wait on the Inheritance, shall be never applied to other purpose in Equity, but is as a Non ens: Others pressed, that the Wife for her Dower is in Law in the Per, by her Husband, and shall be intitled to clear all Incumbrances, as well, and more than the Husband.

Nota, The Wife had not Dower executed, for the Judgment in Dower was with a Cesset Executio during the Term.

Dominus

Dominus Ward contra Dominum Meath.

1 March 1685.

A Bill was exhibited in Chancery against the Husband Baron & Feme. and Wife for Lands in Ireland: The Husband appeared for himself, but departed without making Answer; Wife answer without the Husband. upon which Process continued against him to a Serjeant at Arms, and now, the first of March 1685. the Plaintiff Husband. press for a Decree against the Husband and Wife pro confesso. In the interim pending the Process against the Husband, the Wife got an Order to appear and answer; and did answer, setting forth a Title to her self of the Inheritance, and therefore no Decree could be against her. Decree pro confesso against the Husband. The Court decreed the Bill pro confesso against the Husband only, that he account for all the Profits of the Land received since the Coverture, and the Profits which shall be received during the Coverture, &c.

Hutchins pro Def. What if it appear upon hearing of the Wife, that she hath a Title?

Keck. We cannot proceed against the Wife, for her Wife's Answer no Answer without her husband. Answer is no Answer, being made without the Husband's Answer.

Note, By the Proceedings in this Cause no Decree can ever be had against a Feme Covert for her Inheritance, if the Husband will not appear.

Mr. Solicitor, who was a Counsel for the Defendant, upon reading of this Report to him, told me that the Defendant never did appear; but a Commission being taken out for the Husband and Wife to appear, it was taken by the Court as if he had appeared, though it was never executed for him.

Resp. Quære, For an Ejectment, or an Original Writ cast or taken out in the name of a Party, is no Extort, &c.

Barker *contra* Turner. 5 March 1685.

The Case.

Copyhold.

A Copyholder to him, and the Heirs Male of his Body, purchased the Fee-simple to him and his Heirs; and afterwards for a valuable Consideration, viz. 300 l. sold the Land, and conveyed it to the Defendant, who was in possession divers years. The Copyholder died, leaving Issue a Son, a special Verdict was found at Common Law; the Question being, whether the Son hath Right or no?

Now the Lord Chancellor was of opinion for the Purchaser, and that the Conveyance was good against the Heir; for the Copyhold being severed from the Manor, there is no means to bar it; but by Conveyance at Common Law, the Intail is not within the Statute of Westminster the second.

But the Lord Chancellor took time to advise.

D E

Termino Paschæ

Anno Regis 2 Jac. II.

In

CANCELLARIA.

Holley *contra* Weeden. 1686.

T Thomas Castle, Anno 1657. borrowed of the Plaintiff several Sums, viz. 200 l. and bound him and his Heirs by Bond for payment, and died seised of the Lands in fee; which descended to his Daughter, and on her death without Issue, to the Defendant Robert, and he entred, the Money being unpaid. The Plaintiff, Mich. the 16th of Car. 2. filed a Bill against Robert, as Heir, who pleaded riens per descent, and Verdict against him at Norfolk-Assizes; but before the day in bank Robert died, so as the Plaintiff could not have Judgment. Robert left Robert an Infant, his Son and Heir.

Then, Trin. 31. Car. 2. the Plaintiff filed an Original against the Infant in the Common Bank; and Michaelmas last Robert the Infant coming of age, the Plaintiff declares against him on the two Bonds, who pleaded riens per decensum die Brevis, and Issue was joined.

The Defendant pretends that Robert the father by his Will devised the Lands to the Defendant Weeden, &c. a little before his death.

The

The Plaintiff exhibits his Bill to be relieved against the Will, and pressed that he ought to be relieved, for the Lands were liable in Law to his debt; and the Plaintiff while they were so liable, did do all the Law required in suing Robert while he was seised of the Lands by Descent, and renewing the Suit against the Infant, and must have had Judgment against Robert if the Act of God, viz. the death of Robert had not prevented it; and it is not reason that a false Plea should advantage and profit himself. Parker and Dee's Case. And if the Suit had abated by other occasion, yet in a Writ by Journey's Account, though Robert, had aliened the Land on valuable Considerations; yet the Land had been liable, and by the Suit attached, Robert is disabled by Act executed, (Feoffment, Fine or otherwise) to discharge the Land any more by his Will.

The Lord Chancellor dismiss the Bill.

Drury *contra* Hooke. 1686.

Brokage.
Bond.

THE Plaintiff gave a Bond to the Defendant, conditioned in effect, that if the Plaintiff married A. S. then the Plaintiff to pay a certain Sum of money.

A. S. was a young Gentlewoman, and had 2000 l. Portion; and the Plaintiff being about Sixty years of Age, and having Seven Children, made use of the Defendant to procure the Marriage; and he did it, and put the Bond in Suit, the Bill was to be relieved against the Bond.

Mr. Finch and others for the Plaintiff, press the great Inconvenience of such Brokage, especially in the case of young Persons, and it were prejudicial to the young Woman.

Serjeant Rawlinson and others *e contra*. We are Defendants not Plaintiffs, and the Bond is good at Law; and in the Case between Cressey and Crooke, the Court gave no relief in the same Case: Which was, that the Lady Shipdain, being a rich Widow, lodged in
in

in Crooke's House, and Cresley agreed with Crooke that if he could get him Access to the Lady, he would give him a Sum of money if he married her, and gave Bond to pay it: The Marriage proceeded, Crooke put the Bond in Suit: Cresley sued in Chancery to be relieved, and was dismissed.

Lord Chancellor. Great difference of a Widow forty five years of Age, and a young Maiden that has no Friends to advise her; and therefore decreed for the Plaintiff.

Such Bonds are of very ill Consequence.

D E

Term. Sanct. Mich.

Anno Regis 2 Jac. II.

In

CANCELLARIA.

Attorney General *contra* Ryder. 12 Octob. 1686.

Legatees.

SIX hundred pounds devised for Ejected Ministers:

First, The King had disposal of the Money.
Secondly, A Legatee where there were many Legatees, sued for his Legacy.

The Executor sets forth, that there were divers other Legatees, and that there was not sufficient Assets to pay all; and therefore insisted, that the other Legatees might be Parties, that they might come into the Account and abate equally, else the Executor should be put to divers Accounts, and the Account with one will not bind the rest.

But to that the Lord Chancellor regarded not.

Thirdly, The Executor sets forth a Revocation of the Will, by which the Legacy was given.

Will under Probate Ecclesiastical not triable here.

Lord Chancellor. The Will is under Probate Ecclesiastical, and I will not try it here: Go to the Ecclesiastical Court, and prove it there.

Burton

Burton *contra* - - - - 29 October.

O Rdered that a Report made in the Cause, be re-
ferred back, but the Defendant to pay Costs if
he changed not the Report considerably ; but no time
being prefixed in that Order for the Master to report, by a
subsequent Order the Report was to be made by the Third
of November. The Master was attended several times,
and a few days before the Third of November gave a Cer-
tificate that he was ready to report, but by reason of its
Length and Schedules of Particulars, he could not finish
it within the time ; and without further Order for further
time, did finish his Report, which was done four or five
days after the Third of November : The Draught of which
Report the Plaintiff perused, and the Report was filed :
The first Report and the second differed 3700 l. so that the
Report was to the advantage of the Defendant 3700 l. &c.
but the Plaintiff proceeded to the hearing of the Cause ;
and the second Report being made out of time, viz. after
the time elapsed for the making thereof, the same was dis-
allowed, and the first Report decreed. But if the Defen-
dant would bring into Court the Money first reported, the
second Report should be considered. And the Plaintiff got
Costs taxed to 140 l. or thereabouts : And now the Defen-
dant moved, that he being also but a Trustee, might be dis-
charged of the Costs, which were not settled by the Decree,
but imposed only as a Penalty in case he caused the Plain-
tiff to travel in the Report without just cause, which he had
not done, as appear'd by the Report.

Second Report.

Report made
out of time, dis-
allowed.

The Lord Chancellor disallowed the Motion, and ordered
the Cost, unless the Defendant would bring the Money
first reported into Court, and shewed much displeasure a-
gainst the Master for making and filing the Report without
Warrant expressing, as if it had not been gain'd gratis.

Lady Harvey Defendant, at the Suit of Thomas Harvey, Executor to John Harvey her late Husband.

The Case was, viz.

Parol Agree-
ment against
Trust by Deed.

There was a Marriage agreed to be between them; she brought him a great Personal Estate value 30000 l. and she was seised of Lands of the yearly value of 1200 l. or more, and his Land about 800 l. per Annum; and both were agreed to be settled for their Lives on them, Remainder in tail Male to their Sons, and the Fee-simple of her Lands in default of the Issue Male, as she should appoint, &c. and in default of such appointment, to him and his Heirs, for that there had been long Love, &c. between them. Sir John Coel was indifferent Counsel to draw up the Conveyances; and when John Harvey came to Sir John Coel, he then took notice that if the Lady's Land should be settled as aforesaid, then the same would be obnoxious to Sequestration: For John Harvey had been in Arms for K. Charles, and at that very time was secretly engaged in a Plot for the King; thereupon he consulted with Sir John Coel how to avoid that Mischief: Who thereupon advised, and drew up the Settlement with a precedent Interest and Estate, for years to be in Trustees: In trust that the Trustees, their Executors, &c. should dispose of all the Rents and Profits of the Lady's said Land from time to time, as she alone should without her Husband dispose, and to such Persons as she alone should direct; and with a Covenant by John Harvey, his Executors, &c. for performance.

Accordingly it was done, the Marriage took effect, and they lived about 20 years: John Harvey in presence of his Wife made his Will, and acquainted her therewith; whereby he gave her all his Jewels, and 20000 l. to be laid out in Land, and his Wife to be estated therein for her life, and gave her other Legacies; but made the Plaintiff Thomas his Executor, and gave to him the residue of all his personal Estate, and died.

Some

Some time after his death Differences arose between the Lady, and Thomas the Executor: The matter was, viz.

John the Husband and his Wife living so long together, he, notwithstanding the said Trust excluding him from the Profits, and his Covenant did constantly take all the Profits, and disposed of them in House-keeping, and otherwise as he pleased, and they both made Leases to Tenants without the Trustees; but now the Lady upon the Covenant would have Account and Satisfaction for the Profits received by her Husband from the Plaintiff, who exhibits this Bill to be relieved against the Covenant, for that the Lease for years was made only to protect the Wife's Estate against the Violence of those times, and not to exclude the Husband, but the Sequestrators: And in proof hereof, Sir John Coel, who was a Master in Chancery many years, and of a very clear Reputation, did fully depose thereto; and the change of the first intended Settlement was by the appointment only of John Harvey; and though his Testimony was single, the nature of the Case required Secrecy, and the subsequent Perception of the Profits without Complaint or Interruption by her or the Trustees, and Leases aforesaid, and the Testimony of a Woman that the Lady had expressly affirmed she had not made any such, (but this Testimony of the Woman was not much insisted on by the Plaintiffs Counsel or the Court;) but there were some other Settlements of Personal Estate to the like purpose to have been made, which were never made nor insisted on to be made; because Cromwell shortly after dying, then John Harvey thought himself out of the danger. But on the contrary, it was very fully and at large insisted on, that against Conveyances by Fine and Deed on consideration of Marriage, and so great Portion, and settled by Advice of Counsel, the Court might not relieve against a Trust express in a Deed indented; and how dangerous such a Precedent would be, and the silence of the Lady not interrupting or complaining of the taking of the Profits during her Husband's life was not considerable, for it may be that she was not willing to displease him, and she knew her Husband had a great Estate to leave, and hath left sufficiently to satisfy her of the Covenant; on which she desired nothing in this Court, but would take her remedy at Law, which she hoped that the Court would not hinder, and not let it be in the power of any single Person of what Credit

or

or Reputation soever he be of, against a Settlement by Deed, Fine, Consideration.

But on this Point chiefly the Court decreed for the Plaintiff against the Widow, and so did Sir Harbottle Grimstone do before; and on re-hearing of that Decree it was affirmed by the Lord Finch; and now on a third hearing confirmed by the Lord Chancellor Jefferies.

There was another matter moved and insisted on, viz: If in such case of Separate Maintenance, the Wife permit the Husband still to receive and spend possibly in her Maintenance, that the Executor of the Husband after his death should be put to account.

But I observed not that the Lord Chancellor now grounded his Decree on that.

Hale *Executor of Rose Hale contra Anthony Thomas.* Novemb.

Judgment on
Bond.

SIR Anthony Thomas, and Samuel his Son and Heir apparent, were bound to Rose Hale, Anno 1637. each of them and their Heirs in 2000 l. to pay Rose Hale 1300 l. at days shortly afterwards, which was not paid; whereupon Hale the Plaintiff, as Executor of Rose Hale, obtained Judgment on the Bond for 2000 l. and 12 l. Damages and Costs against Samuel, and by Bill in Chancery against Anthony the Defendant, Brother and Heir of Samuel, setting forth that Samuel had died seised in Fee-simple, but that Anthony the Defendant had purchased in trust for himself, a precedent Statute made to one Dagnall, which was satisfied in Equity by Perception of Profits. Anthony sets forth by his Answer an Intail made by his Grandfather, and descended to him, and denied that Dagnall's Statute was satisfied. As touching the Intail a Trial at Bar was directed; and that the Defendant should not give in Evidence, the Statute and a Verdict was for the Plaintiff against the Intail.

And as touching the Statute the Plaintiff moved, that the Defendant might either purchase and satisfy the Plaintiffs Judgment, or to account before a Master whether satisfied or not, on penalty to pay Costs of the Suit, in case that the Statute were satisfied. The Master reports the Statute satisfied, and 4000 l. more, viz. 1400 l. by Sale of Lands,

Lands, and the rest by Perception of Profits; and decreed that the Plaintiff should proceed at Law.

The Costs were paid, and liberty given him to enter Judgment on the Verdict.

The Plaintiff took out a Scire facias in the Common-Pleas, and hath there Judgment to take Execution; which he accordingly did on the first Judgment by Elegit, and extends Lands and Houses of the true yearly value of 350 l. per Annum, by the extent of 40 l. per Annum.

The Defendant on Affidavit of this, moves in Common-Pleas to stay the filing of this unreasonable Extent; which the Plaintiff opposed, because that now his Debt and Damages amounted to 5 or 6000 l. and could not be satisfied by an ordinary Extent for 2012 l.

Whereupon the Defendant brought into Court money in Baggs; (viz.) The 2012 l. and prayed a stay of the Extent, according to the Books 16 H. 7. and other Authorities; for the Law provides for the Plaintiff, that the Extent at too low value shall not be obtruded on him, for in that case he may pray that the Extenders shall pay him his money, and hold the Lands extended at the extended value, which they must do, and shall: And on the other hand, if the Extents be too low, the Defendant hath his remedy by tender of the money to stay the Extent, which by the Laws and Authorities of the Books he may do before the Extent filed, and so stay the Extent; or after the Extent at any time, he may tender so much as remaineth to be levied by or according to the Extent, and compel the Plaintiff to receive it; and the Extent shall thereon cease, and be discharged, and a Scire facias lieth in that case; and for that reason the Defendant hath no remedy against the Extent, when once filed, but by that Course; and therefore the Defendant, now when the money lay in Court, prayed that the Extent might be stayed, and the Plaintiff receive the 2012 l. The Court was satisfied that the Extent ought to be stayed, but would not adjudge the Plaintiff to receive it; but left that for the Plaintiff to do what he would.

Whereupon the Defendant took out a Scire facias against the Plaintiff, to shew cause why he should not receive the 2012 l. and the Extent be stayed: To which (Writ being served) the Plaintiff appeared not, and Judgment thereupon given in Communi Banco, that the Land be discharged of any Extent.

But

But then the Plaintiff petitioned the Lord Chancellor, that the Cause might be rehear'd in Chancery on the Original Bill, setting forth in his Petition the Master's Report, and the Stop of his Extent upon this Judgment; and now the Cause came to be heard accordingly.

Mich. Term. 2 Jac. 2. Serjeants Rawlinson and Hutchins, and Mr. Finch, Mr. North, Mr. Keck, and others of Council for Hale the Plaintiff. The Bill was opened, and the other Proceedings in Chancery; the Equity they pretended to arise to them, because that the Defendant having as the Master reported, been over-paid above Bagnall's Stat. 4000 l. he immediately after that Statute satisfied, received the Profits in wrong of the Plaintiff; and as some of the Council expressed it, became a Trustee, or in nature of a Trustee, for the Plaintiff, which had not the Plaintiff been hindered from extending at that time by the false Plea of the Defendant, by setting forth an Intail and Extent falsely, the Plaintiff by his Extent would have had.

In answer to which the Defendant insisted:

1st. That when the Creditor lent the money, and chose his own Security by taking a Penal Bond for it, he made himself Judge what Recompence he should have in case the Obligor perform'd not his Agreement; so as if a Man agree to do or not to do such or such a thing, and take Security to do it or not to do it, This Court shall never enlarge his Security, and better it for him; and to that purpose Curtis and Dawes Case was put, and Elliott and Hales Case.

And in the debate of this Case, the Lord Chancellor by way of question askt the Plaintiffs Council, If a Man for money takes a Mortgage, and lets the Interest surmount the value of the Mortgage, shall this Court mend it?

As to the Falshood of the Answer, the Answer was not a contrived known Falshood; for 1900 l. was satisfied not by Profits but Sale; and as to the Intail, it was not false but true, for the Land was intailed: But the Plaintiff Hale at the Trial produced a Fine levied by Samuel Thomas our Brother, which Fine was not of a third part of the Houses intailed, and consequently not of that third part till Election of the Conizee and Cestuy que use; which never was done, as if Tenant in Tail of Three hundred Houses

Houses or Acres of Land, leby a Fine of One hundred; it is no bar of all or of any part till Election made, and till Election the Lands remain intailed: Upon which grounds we first inferred, that our Allegation that the Land was intailed and descended so, was not false, at least it was a probable and disputable Point, and not culpable to be alledged, to draw upon us a Penalty beyond the Penalty of a Bond, as was endeavoured.

2dly. The Report of the Master that chargeth us with the Profits of the whole Land, when part was only bar'd, is a wrong to us, which now we may alledge at the hearing of the Cause at large; for in truth the Plaintiff was not apprised of this before the Master.

Lastly, The Plaintiffs Bill being to set aside Incumbrances, to the end he may have remedy at Law, and had a Decree that he might go to Law accordingly, and in 1684. pursued that Decree, and had an Order to take Execution on the Judgment, and after took out (in pursuance of the Decree) a Scire facias to have Execution, as he did the 33^d of Car. II. and Judgment thereupon to take out Execution without Damages; for in a Scire facias no Damages are ever given, and after that Judgment took out an Elegit, which forced us to bring in our money, or lie under that unreasonable Suit, where it still remains; and it is too late now since he has made his Election to go from it, and it was a strange Case where a Man has obtained a Decree to proceed at Law; and having proceeded at Law, hath got as much as the Law will give him, then to fly off from his first Decree and Proceeding at Law, to have a new and another kind of Decree, and more than ever he asked in his Bill: By the first Decree and Judgment, and Proceedings, our Person is not charged, but by this new Proceedings he would charge our Person, and turn a real Charge upon our Lands into a personal Charge upon our Person.

In the Debate the Chancellor asked what remedy we had at Law for our money, which we had paid into the Common Pleas Court?

And after long debate, the Court discharged the Order on the Petition, Novemb. 1686. The Lord Chancellor in the debate insisted that the Plaintiff had made his own Election by taking Execution by Elegit.

Durston *contra* Sands.

Patron took
Bond to resign.

Perpetual In-
junction.

THE Defendant, Patron of the Church of in Gloucestershire, took a Bond from the Plaintiff to resign upon request.

Upon hearing the Cause, a perpetual Injunction was decreed against the Bond.

For the Court, and all sides agreed, that the Bond was good; yet if the Patron made use of it to his own advantage, by detaining Tithes or the like, the Court would relieve against the Bond; and in this case the Patron did detain his Tithes from the Plaintiff, whom he had presented; he pretended in his Answer a *Modus decimandi*, but made no proof of it, and being Patron of several other Churches had taken Bond from those he had presented, and made ill use of it.

Hall *contra* Thomas.

Vide Ante Hall.

THE Report of the Master, which chargeth Dagnall's Statute (which was precedent to the Plaintiff's Judgment) to be satisfied; and upon which Report the Plaintiff was let in, and now the Plaintiff being said *ut supra*, from further Execution: Yet now prayed a new Hearing of the Original Cause, insisting that by the Master's Report it did appear that the Defendant after Dagnall's Statute satisfied, had received of the Profits 500 l. per Annum, and so on the whole matter had received 4000 l. and as soon as he had satisfaction of Dagnall's Statute, he became in the nature of a Trustee, and responsible to the Plaintiff for the Profits received.

But in regard of his taking Execution by Elegit, the Lord Chancellor would not relieve the Plaintiff in that Point, but inclined against the Plaintiff on that Point also.

But if it had come into debate, the Master's Report must have been re-examined, and would have failed.

1st. Be-

1. Because there was a grand Mistake therein, for he computed 500 l. per Annum for two years to amount to 1500 l. which cannot be. 2. But a greater was the Intail of the Houses is of 300 and more, and the fine leyed to bar the Intail was not of 300 but of 80, or thereabouts, which in truth bar'd no part till Election of the Conizee, &c. but clearly could be no bar of more Houses than are comprehended in the fine. But yet the Master hath charged the yearly profit, being 500 l. on the whole Houses, in satisfaction thereof. 3. Another Error in the Report is, that 1900 l. was raised by Sale of part of the Inheritance, which is not wholly to be so charged; for the Inheritance is not to be sold to satisfy the Profits, but only the annual Profits.

Canning *contra* Hicks. 26 Decemb.

Mortgage where the Mortgage was of the *Fee-sim.* Testament. ple to him, devise 100 l. and other Legacies, and Legacy. then adds a Devise of 100 l. to the Defendant, whom he makes Executor, and dieth.

Two Points were decreed:

1st. That the Executor shall have the Benefit of such a Mortgage, viz. the Land, and not the Heir, though the Land be descended to him.

2dly. That the Legacy doth not bar the Executor of the Mortgage, though it was much prest by Mr. Finch and others to the contrary, and that it was an Implication that the Executor should have no more than the 100 l. because the Testator expressly willed that the Executor should not be paid his Legacy till after his Debts, and other Legacies paid; so that the 100 l. is as much in this case, as if he had expressly devised the 100 l. out of the residue of his Estate after his Debts and Legacies paid, which doth strongly infer he meant no more than the 100 l. not the whole residue.

*The Lord of Kildare Plaintiff, Sir Morrice Eustace
and others, Defendants.*

A Lease for fifty years was made by Sir Morrice Eustace deceased, in trust for George Fitz-Garrett: That George Fitz-Garrett was attainted of Treason in Ireland, and an Office found, whereby the Trust was forfeited to the King, and derives Title to the Trust by Grant from the King, and prays that the Defendant, who is Executor to the Lessee, may execute the Trust, and assign the Lease. The Defendant by Answer confesseth the Lease and Trust; but that George Fitz-Garrett who was attainted, was not the Cestuy que Trust, but another Person who in truth was a Rebel in Ireland, and attainted of Treason; so as the King had no title, and that if the King had any title, yet the Bill in Equity did not lie; because if all were true, yet by the Act of the Settlement, which gives all Lands of the Rebels in Ireland which they or any in trust for them, should be to the King; thereby the Estate of the Lands is in the King, and not only a Trust: And sets forth further, that those Matters had been questioned in several Suits, viz. whether that Sir Morrice Eustace the Lessee, were the same Person who was attainted or no, or whether the Estate or a Trust only vested in the King? and that the now Plaintiff had had three Suits by Bill in Equity, and also a Bill in Chancery in Ireland, which he waved, (I think) dismissed, and the Defendant had two Verdicts at the Bar in Ireland for his Title, viz. That Sir Morrice Eustace the Lessee was not the Person attainted, but another of that name; and thereupon the said M. E. coming into England to defend himself, the Plaintiff did dismiss his Bill in Equity in Ireland, and exhibited this Bill.

The Cause being heard here, the Lord Chancellor doubted whether as this Case is circumstanced, viz. after two Verdicts and Judgment in Matters triable in Ireland, viz. which of the two was the Person who was attainted, and the Point in Law upon the Act of Settlement, he could not determine it, and Precedents directed to be search'd: And the Chief Justice of the Common Pleas, and Chief Baron of the Exchequer to be attended with them, which was done; And now the Cause, the said Judges assisting, came to a hearing,

hearing, and the Plaintiffs Counsel Serjeant Holt, Mr. Finch and others, argued for the Plaintiff, making the question to be, whether a Trust of Lands in Ireland, and the Trustee being here in England, this Court hath Jurisdiction; for this Court cannot execute their Decree by Sequestration, or giving Possession of Lands in Ireland they can compel the Party; and in the case of Partition, the Court here decreed Account of the Profits, although they dismissed the Bill as to the Partition of the Lands: And though here the Court will not grant Sequestration as in the Case of Partition, nor name Commissioners in Ireland to make the Partition; yet they cannot compel the Party to convey by Imprisonment, and otherwise there would be a failure of Justice; for they in Ireland cannot relieve because the Party is here, and we here because the Land is not here.

So no Justice could be done, and the Bill dismiss.

D E
Term. Sanct. Mich.
Anno 3 Jac. II.
In
CANCELLARIA.

Alderman Backwell's Case. 8 Nov. 1687.

Commission of
Bankrupt.

Supersedeas.

A Commission of Bankrupt issued against Alderman Backwell, and the Creditors who sued out the Commission were compounded and agreed with; and thereupon a Supersedeas to the Commission was granted. The Earl of Exeter, and a hundred other Creditors, petitioned that the Commission may be revived, and the Supersedeas quia improvide emanavit, set aside.

And by Pemberton Serjeant, and others, insisted;

1st. That they were the greatest number of the Creditors who desired it.

2dly. The Commission is de jure granted, and could not at first have been denied.

3dly. And when it is once granted, then all the Creditors, every one of them, are interested in the Benefit and Proceeding of the Commission equally with the rest of the Creditors, at whose Petition the Commission was granted; so as they came in, and pray to be admitted within the four Months, and tender their Contribution.

4thly.

4thly. And the Non-Petitioners now pray to be admitted, and though now the four Months be past, it is not their fault, because the Superfedeas being granted within the four Months, they could not be blamed, for they had time till after four Months.

5thly. And seeing they were interested in the Commission as well as the Petitioners for the Commission, the other Creditors cannot hinder them from coming now into it, without which they should lose their debts.

The former debates on this matter did produce some Propositions of Accord, between M^r. Backwell, Son and Heir of the Alderman; which now not being acquiesced in, &c.

Lord Keeper. I hold that the Commission is de jure, and the Statute which saith the Chancellor may grant, &c. is as if it had been, shall grant or ought to grant; but he cannot grant ex officio, but on request of Persons interested. If twenty Men swear before me, that J. S. is a Bankrupt: Yet without Petition of a Creditor I may not award a Commission; but when it's once granted, if the persons that petition were well satisfied, I do think a Superfedeas may be granted as well within the four Months as after, possibly they who petition find that it is best for them so to have it; for if their Debts be by Judgment, they will be preferred before others: Whereas on the Commission they must come in but in proportion with others, and it is quæstio Juris. I will hear it assisted by Judges.

No Commission
of Bankrupt
granted without
Petition of a
Creditor.

Note, When once a Commission is granted, it's folly for the other Creditors to sue for their Debts at Common Law or Chancery; for if they should recover, yet it will not avail them, but they must be liable to the Commission; so if they had Judgment not executed 'twere vain to sue Execution, and therefore time is given to all Creditors, viz. four Months to come in; and if they might be hindered to come in before the four Months, it might be made a Trick to couzen them, viz. A. hath Judgment, B. sueth out a Commission, compounds, &c. and takes satisfaction, gets a Superfedeas. A. could not have Execution.

After.

Afterwards other Creditors petitioned the Lord Chancellor, Sir George Jefferies, Baron of Wem, to take off the Superfedeas, and to renew the Commission.

Which was much opposed by Mr. Backwell, Heir to the Alderman, who had after the Superfedeas granted, and granted at the Suit of all the Creditors, who petitioned at first for the Commission, compounded and agreed with the said first Petitioners.

And now the 8th of November 1687. The Attorney General, Pemberton, Holt, Serjeants, Mr. Finch and others, argued very earnestly against the granting of the Commission :

1st. Because Alderman Backwell, against whom the Commission was first granted, was dead, and was not in his life declared a Bankrupt.

2dly. Because by the death of the King, the Commission is determined, as all other Commissions are ; and if the Stat. Jacobi had not provided otherwise, the Commissioners could not have proceeded after the death of the Bankrupt, though they had acted or dealt in the Commission before the death of the Bankrupt ; but the Statute provides for that Case, but doth not provide in case of Abatement of the Commission by the King's death, with whom all Commissions died also ; and they argued much that by the words in the Statute, viz. (dealt in) is meant a Proceeding by the Commissioners, (as Holt said) till distribution, (as others said) till the Party were declared Bankrupt.

Lord Chancellor. I am no Friend to the Commission of Bankrupt ; it hath occasioned much Hurt, and instanced in a Case lately before him, wherein the Charge and Expences of the Commissioners, and their Attendance, came to 400 l. and the Distribution to the Creditors 7 s. in the pound ; each Commissioner claimed 20 s. per Diem, 10 s. half a day, &c. but as to this Case, I do renew the Commission for the Agreement of the Persons who first petitioned ; for the Commission cannot prejudice any other Creditor that did or might come in and contribute, yea tho' there should be but one such Creditor for the Petition ; for the Commission is expressly in behalf of themselves and all other Creditors ; and the Commission is so granted, and cannot be other.

otherwise, so as the Petitioners for the Commission are no more concerned than others, or any others that shall come in; and the Statute that gives continuance to the Commission when the Bankrupt dieth, maketh it all one as if the Bankrupt died not; for tho' he be dead, yet as to this purpose he is still living.

(Lord Chancellor to Pemberton.) Suppose Backwell were living, and the King dead, Might not the Commissioners proceed, or grant a new Commission?

Pemberton. Yea, a new Commission.

(Chancellor.) Yes, and proceed where the other left, and their Proceedings as effectual as the former, or any Acting of Commissioners: If it be but receiving Money for Contribution, (as they did of some) of the new Petitioners, is a dealing within the words of the Statute. And in fine he granted the Commission.

Note, The Superfedeas was granted within the time the Statute gives to Creditors, who did not petition to contribute; and they being now by Act of Court disabled, may not they after renew?

C A S E S

Omitted in the Former P A R T of

Cases in Chancery.

D E

Termino Paschæ

Anno Regis 26 Car. II.

In

CANCELLARIA.

Taylor *contra* Beversham.

The Case.

Rebutter of
Equity.

S Hephard seized of a Copyhold held of the Manor of D. Taylor purchased the Copyhold, and after he also did purchase the Manor of D. and after treated with William Beversham for the purchase of the Manor. Taylor gave him a Particular of the Manor, wherein all the parcels of the Manor were expressed with their several Values, but very much over-valued, as was proved. Taylor gave 4300 l. for the Manor, and Beversham

sham paid him 4000 l. for it, but the Copyhold Tenement (value 24 l. per Annum) was not in the Particular. Beversham enjoyed the parcels in the particular six years, but never in that time claimed the Copyhold Tenement, but Taylor enjoyed it; but the Conveyance was of the Mannor and the said Parcels with this Clause (All which the said Taylor purchased of Sheppard) which Clause being affirmative restrained not the Conveyance, but notwithstanding the Copyhold passed as part of the Mannor, and M^r. Beversham recovered the same at Law, and now this Bill was to be relieved against the Conveyance for the Copyhold.

M^r. Attorney, Sir John Churchil, M^r. Keck, &c. The state in Law is in the Defendant, who used no fraud to obtain the Conveyance, and by accident without any Art of his, the State of the Copyhold in Law is in him, and conveyed to him by the Plaintiff, who abused the Defendant in the particular greatly, over-valuing what he sold, and the Values set down; so as there is a Rebutter in Equity to his Demand, not out of a Collateral business, but in this very business; and we offer, that if the Plaintiff will make good his particular, we will quit the Copyhold Tenement.

The Lord Keeper. I like not purchasing by a Particular, it commonly breeds Suits. I find Beversham abused in the particular, but since he neither treated for the Tenement nor paid for it, and other small parcels of 20 s. 10 s. &c. value, &c. are in his Particular and Conveyance; this of 25 l. per Annum would not have been omitted if he had meant to purchase it, and the Plaintiff never intended to sell it, which the Clause also implies, therefore I decree it for the Plaintiff, but he shall pay the Rent arrear, and for the future hold it in all respects, so as Copyhold Estate subject to Forfeiture and incertain Fine, &c. as it was before the Regrant to him by Copy, &c.

Relief against a Purchaser who paid not for it.

Copyhold.

William Strode *contra* Edward Strode *his Brother.*

Not in Issue,
yet proved.

THE Bill was for Evidences of the Inheritance which the Plaintiff claimed by descent. The Defendant set forth a Title to a Lease made by their Father to him for sixty years, but now at the Hearing shewed a Conveyance to him by the Plaintiff himself, which was proved in the Books as well as the Lease.

The Plaintiffs Council, my self and others allowed the Lease, but prayed the Writings touching the Inheritance; for the proof of what is not in Issue is idle, the proof must be of what is alledged, else the Plaintiff is prevented from cross examining or alledging to the contrary, as if he had a Reconveyance, Release or the like.

Lord Keeper. I shall not decree an Inheritance away against what I see; and dismiss'd the Bill.

Street *contra* the Mercer's Company *and* Mosse.

Bankrupt.

COats possessed of a Lease for years contracted with the Committee of the Company for a new Lease, and paid part of the Fine, and by Coats's consent a new Lease was made to Mosse by the Company, and to him executed. Coats was at the time of the Treaty a Bankrupt. The Question was, whether the Commissioners could assign the Lease to the prejudice of Mosse; and Drakes Case was cited.

The Lord Keeper ordered that the Plea and Demurrer be ousted, and the benefit thereof saved till the Hearing; he doubted of the Lease; there were other Matters for the benefit of Mosse also in the Plea.

D E

Term. Sanct. Trin.

Anno Regis 26 Car. II.

In

CANCELLARIA.

Bressenden *contra* Decreets.

Lawrence Oowner being in debted by Judgment, and seized of Lands thereto lyable of the value of 300 l. per Ann. dted Intestate. Charles an Infant, being his Heir, Rebecca his Wife takes Administration and possesseth the personal Estate, and enters as Guardian on the Lands, and receiveth the Profits two years, and made the Defendant Grace Decreets her Executrix, and charged it; she also entred as Guardian, and possessed the personal Estate of Lawrence and Rebecca; Charles dyed, the Plaintiff Bressenden his Heir was compelled to pay 200 l. on the Judgment; the Defendant took out Administration of Charles his Estate.

Heir.
Executor.

The Scope of the Plaintiffs Bill was for repayment of the Mony; but the Defendant pleaded her Administration to Charles, and thereby to be discharged of any account of the Estate of Charles, and demurred, because no Administrator de bonis non was Party.

The Lord Keeper's Opinion was, that the Profits taken by the Guardians should be liable to make satisfaction to the Plaintiff, but the personal Estate in Rebecca's Hand was liable in the first place in case of the Heir to which the Administrator de bonis non is lyable; and in that respect he held the Bill ill, and gave the Plaintiff leave to amend the Bill in that Point.

Gibbons

Gibbons *contra* Dawley.

Testament.
Discretion.

Fifteen accept,
the sixteenth
sueeth, &c.

THE Testator gave several Legacies and devised that the residue should be divided amongst several of his Kindred by Name, sixteen in all, in several proportions set down by him; but devised that the Quantity of the Residuary Estate should be as his Executor voluntarily and without being thereto compelled by Law should declare. The Executor declared what the Sum of the Residue was, and accordingly paid fifteen of those Legatees, but the sixteenth exhibits a Bill to discover the Estate, supposing it more.

After much Debate the Lord Keeper disallowed the Plea, saying, We must take heed that we make not such Examples, under which, if Men will be dishonest, they may shelter their dishonest dealings; and what if the Executor would make no Declaration, this Court will have an account made.

Blake *contra* the East-India Company.

Penalty.
East-India
Company.
Trade.

THE Company employed Blake as their chief Agent in India, and by Indenture they took a Covenant of him, that he should not trade for himself, nor any other in Salt-Peter, Pepper and divers other Commodities; and Blake covenanted to pay several Rates for every pound of Salt-Peter so traded in contrary to the Covenant 6 d. and so of divers other Rates for several other Commodities, which Sums were some four, some five, and some seven times the value of the Commodities. Blake bought the Commodities for himself in India to his own use; the Company brought debt for 26000 l. to which Sum the Penalties amounted against Blake, who brought a Bill to be relieved against the Penalty; and notwithstanding that he proved that it was for the benefit of the Company that he so traded, for he bought none but what he sold to them at a just and Market price, and that if he had not provided such Goods, the Company could not have been supplied, and their Ships would have returned short, and what he bought was with his own Money, when he had no effects of the Company; and although he had given notice of the want to the Company, and he dealt with poor Artificers, who
could

could not stay, but must have advance before-hand, or else they would not work at all, but most probably would have been dealt with by the Dutch to the loss of the Company; and it was proved by the Defendants own Witnesses that such Dealings was necessary for the supply and benefit of the Company; and that the former Agents for the Company, and the Agents for the Dutch used so to do.

Yet my Lord Keeper dismiss the Bill though it was objected that this Covenant was a greater Penalty than a Bond of double the value; so it was but an artificial dividing of a Penalty of a Bond.

Lord Keeper. A Lease is made rendering Rent, and if a Meadow be plowed to pay 5 l. Rent per Acre, is this relievable? I see not how the Company can subsist unless such Trade be restrained. Dismiss the Bill.

Tyas contra Talbot and others.

THE Plaintiff, was Guardian in Socage to the Guardian. Infant the other Defendant, who had sustained di- Contempt.
vers Suits for the Infant, and paid debts to which he was liable, and assigned the Guardianship to Talbot, and decreed an Account; his Disbursements and payment of debts to be allowed, and what due to be paid out of the Infants Estate in Talbot's hands by Talbot. The Master certifies 140 l. due, which was decreed, and Talbot in contempt for Non-payment, appeared, was examined, and set forth on Examination, that the other Defendant, the Infant, dyed two days before the Decree was inrolled, and the Cause set down to be heard: But the Contempt affirmed; for the death of the Infant he had not proved; but there could be no Examination thereto; but the main Reason was because the Lord Keeper took it that the Decree had fixed the payment on the Defendant Talbot, she having confessed Assets of the Infants Estate in her hands by her Answer, and therefore what ere became of the Infant or his Estate, she is liable.

D E

Term. Sanct. Mich.

Anno Regis 26 Car. II.

In

CANCELLARIA.

Parker *contra* Dee.

Executor.
Assets.

Charles Everard a Banker owed the Plaintiff 700 l. and was also indebted to divers other persons by Book debts, &c. without Seal, and by several Judgments to others and to B. by Recognizance in Chancery to perform the Order of the Court, and that being for Money there was a Judgment thereon, so the Recognizance and Judgment was for the same debt in effect, the Defendant being Executor of Everard. Trin. the Plaintiff sued the Defendant in Communi Banco for his debt. The Defendant pleaded all the Judgments which were on penal Bonds, and pleaded also the said Recognizance, *ultra quod*, &c. he had no Assets; the Plaintiff sued here April 1668. to discover the truth of the Plea, and Debts therein set forth and the Assets.

Thereupon the Defendant obtained an Order that the Plaintiff should make Election whether he would proceed in this Court or at Law. The Plaintiff elected to proceed here. The Defendant used very many delays by Petition and Contempts to put off the Hearing in this Court, and paid divers of the Debts which were of the same nature with the Plaintiffs debts without Specialty, pending the Suit in this Court. The Cause being heard it was decreed to go to an account, wherein the Executor was

was to be allowed all just debts due by Record or Specialty, and all debts without Specialty, which were paid before the Plaintiffs Bill to be allowed; but not such as were paid voluntarily, pending the Suit, or whereon voluntary confessed Judgments were for debts without Specialty.

The Defendant got the Master of the Rolls, who heard the Cause, to Rehear it, and used other delays, and at last appealed to the late Lord Chancellor, who made a Decree therein; and not content therewith, appealed to the new Lord Keeper. A Case had been stated, and the Cause being new heard by the Lord Keeper, the Defendant pressed for dismissal, because the Plaintiff had the effect of his Suit to make a discovery, and it was his Ignorance to choose to be dismissed before such time as he had examined his Witnesses.

Lord Keeper, &c. There have been six Hearings in this Case, three on Interlocutory Orders, and three on the Merits; as for dismissal to Law, because the Plaintiff hath discovery here; when this Court can determine the Matter that shall not be an Hand-maid to other Courts, nor beget a Suit to be ended else where; the Defendant hath used great shifting and shewed great Partiality; his Plea at Law was false and deceitful, for it appears he compounded debts at smaller value, and pleaded the whole debt as due; he compounded a debt of 300 l. for a Jewel 200 l. value, and in truth but worth 100 l. and paid debts of the same nature as the Plaintiffs, pending this Suit, without compulsion by Suit, which he ought not to have done; for after the Suit begun the Executor may not excuse himself by any voluntary payments; he may use legal delays, as Imparllance and Essoins, &c. to prefer one Creditor before another, but he may not do it by false pleading of what is yet in his own knowledge; otherwise, if the falsity lie not in his knowledge, as Non est factum Testatoris, in this Case the Plea was false and fraudulent, and therefore the Plaintiff here shall have the same advantage as if the same Plea were found false by Verdict at Law, and shall have all the same consequents here as follow on a false Plea at Law to all intents. And all Judgments voluntarily confessed after his false Plea go for nothing, and decreed accordingly, account of Assets with their directions; but Copyhold are no Assets, and the Lands devised or conveyed to pay debts must be in proportion equally of debts by Bond or otherwise.

Rothwel *contra* Sir Charles Hussey, Dame Hussey, &c. 20 Novemb. 1674.

Lease Parol.
Trust in four,
three Lease.

SIR Charles Hussey, Father of the Defendant Charles, &c. seized in Fee, made his Will, and devised the Lands in question to Sir Richard Markham, B. B. W. B. and White for one and thirty years, in trust to pay his debts and portions to his Daughters, and after for his Heir, and died: The Will is proved in common Form, and Sir Richard Markham and two others of the Trustees without White, the fourth Trustee, by Writing under their hands authorize Rose, who was Sir Charles Husseys Bailiff at the time of his death, to continue and to receive the Rents, manage and let the Lands, who by Parol let them to one Bonnor for eleven years; Bonnor assigned to the Plaintiff, who entred and enclosed, &c. There is an Action at Law brought by the Heir, and an Ejectment sealed, and Judgment in both Actions. The Plaintiffs Bill was to establish his possession, and to be relieved against the Actions; the Equity was because the Lady Hussey detained and concealed the Will, so as the Plaintiff could not make his defence at Law by the Will, being of Lands, so as the Probate was not Evidence; and in truth the Lady had the Will, and confessed she had a Paper subscribed by Sir Charles Hussey, but knew not that it was her Husband's Will, and she did now produce it in Court at Hearing; yet because the Plaintiffs Title was but a Lease Parol, the Lord Keeper declared, he would never give Relief. And secondly, for that the Lease was a breach of Trust being by authority of three only, and he would not give Relief to a Lease made in breach of Trust, therefore he dismissed the Bill, though it was objected, that the Verdicts were on the Heirs Title, which was contrary to the Trust.

Woodward

Woodward *contra* King.

Woodward had an Injunction for keeping, &c. possession, which in truth was issued under Seal, but no Order or Affidavit to warrant it, but Order and Affidavit were after, viz. in December, though Injunction was in December. One Urry delivered Mr. King a Copy of the Injunction, and as he swore, shewed him the Writ under Seal. King desired Urry to shew him the Writ to examine the Writ and Copy, to see how far he was concern'd in it, which Urry denyed, and King thereupon delivered back the Copy, but disturbed Woodward's Possession. King being prosecuted for the contempt, it appeared sufficiently, that there was a disturbance and contempt; if the Writ was well served it was acknowledged to be a good Service *prima facie*; but when sight of the Original was desired it ought to be shewn, as in Mackalleys Case, A Bailiff or Sheriff makes an Arrest, he need not shew the Capias; but if the Party requires to see it, he must shew it, or the Party is not bound to obey it; and if the Officer will not shew the Writ the Party may resist the Bailiff, and is not in contempt for his resistance; but though it be in case of Murder ensuing, is excusable, and much more is the Defendant excusable where a private person, who is no Officer, serves a Process on him, if he refuseth to shew it, when he is requested to shew his Warrant, viz. the Writ, else 'tis he who serves the Writ is disobey'd rather than the Writ, and otherwise the Inconvenience may be great; for if an Injunction be not granted, but one shews another Writ and delivers the Paper, and tells the person that it is a true Copy of an Injunction to deliver possession, or to deliver up a Bond or other Writings, whereas there is no such Injunction; if he will not shew it, however I must believe, and either fall into contempt or lose my possession, or deliver up my Writings to I know not whom; and what remedy then? For though in eventum rei, if I disobey I shall be free, because there is no ground of the Writ, yet I am in danger and in doubt till I can examine it; and suppose it be true, that such Injunction was, yet possibly I knew not of it, and then it were very hard that the bare affirmation of a Stranger, who served the Writ, which may be is unknown to

Service of an Injunction.

Coke's Reports.

Lord Keeper.
The Party below shall obey.
If he will dispute he shall do it here.

me, (and they are commonly mean Persons who serve Pro-
cess) shall put me on a Dilemma, either of Contempt, or loss
of Possession, or the like.

But the Lord Keeper declared the Service sufficient to
ground the Contempt; for if he should deliver it to one
Party, if he keep it, how shall the rest be served with it?

His Lordship was going to the Council, else it might
have been replied, that it is one thing to shew it to be exa-
mined, and another to deliver it; he was not desired to deli-
ver, but to shew it to be examined. 2d. Such Mischief may
be prevented if fear be of such Miscarriage by taking a
Duplicate.

The Lord Keeper declared, that notwithstanding the Ir-
regularity of issuing the Injunction, it ought to be obeyed;
and though the disturbance which was, was by a Justice of
Peace on view of Detainer of Possession with force, and
there was a Detainer with force, yet that should not excuse
it, for then the Process of this Court should be subject to a
Justice of the Peace.

Duckenfield *contra* Whichcott.

Rent not abated
by Loss or E-
viction of Pro-
fits, &c. if no
Covenant.

SIR Jeremy Whichcott, Warden of the Fleet, granted
the same with some Exceptions, to the Plaintiff for
1000 l. in hand, 1000 l. per Annum, and 200 Dunces of
Plate Rent: His Agent Gibbon gave a Particular of the
Chamber Rents to the Plaintiff, to induce the Plaintiff to
the Bargain: Afterwards on Complaint of the Prisoners,
the Judges of the Common-Pleas reduced the Rents of the
Chambers which the Prisoners were to pay, so as they
came to near a quarter less in value. The Plaintiff there-
on sought to be relieved, for this Order is compulsory, and
in nature of an Eviction; for though the thing remain, the
Profits which answer the Rent are taken away: But in
regard there was no Covenant in the Assignment for the
upholding the Values, or that they were such:

The Lord Keeper conceived it as other Cases of Pur-
chase, where it seldom happens, but things are over-valued.
He dismiss the Bill.

Other Matters were debated, but Whichcott offered in
his Answer to pay back all on mutual account, &c. if the
Plaintiff would waive his Bargain. The Plaintiff was put
to his Election to take the offer, or be dismiss.

Lingon

Lingon *contra* Foley.

D Ecree'd that a Devise of Lands to Trustees on Trust Land sold where
out of the Rents and Profits, to pay Debts and Legacy, out of
Legacies; the Trustees may sell the Land it self: Profits. This
Point rose on Sir Henry Lingon's Will against Foley, who
purchased and had notice of the Will.

2. Henry, Son of Sir Henry Lingon, devised Lands to Incumbrances.
be sold for payment of Debts, the whole Estate being in-
cumbred: The Trustees sold Stoke, part of the Lands, for
6000 l. and the Trustees assigned to him several of the In-
cumbrances bought off with his Money, and allowed good,
tho' the Estate not wholly freed thereby.

D E

Term. Sanct. Trin.

Anno Regis 27 Car. II.

In

CANCELLARIA.

Lutton *contra* Rodd. 21 June 1675.

Money refused
loseth no Da-
mages.

A Deed in nature of a Mortgage and Covenant to re-convey on payment : The Money was tendered at the day and place, and refused : Decreed the Money without Interest from the time of the Tender, and to re-convey, though that the Plaintiff ought to make Oath that the Money was kept, and no profit made of it.

D E

D E

Term. Sanct. Mich.

Anno Regis 27 Car. II.

In

CANCELLARIA.

Miller *contra* Stephens. 1675.

SIR Lewis Pollard made a Lease for years to Sir Trust.
 John Northcot and others for payment of his Debts,
 and died: The Reversion descended to Sir Hugh
 Pollard: The Trustees, and Sir Hugh, assigns the
 Term to Stephens by way of Trust to pay Stephens 750 l.
 Sir Hugh Pollard confesseth Judgment to Miller; Ste-
 phens receives the Profits, and pays them to Sir Hugh,
 to the value of 800 l. Stephens having no notice of the
 Judgment, nor was there any Extent on the Judgment.
 Decreed by the Lord Keeper; That he account, and the
 800 l. not to be allowed otherwise than as to go in satisf- Satisfaction.
 faction of his Debt, viz. Stephens's Debt.

Anonymus. 5 November 1675.

Lessee for years subject to a Trust, deviseth Resid' Lease renewed.
 bonor' the Estate would but pay the Debts if all sold; Executor.
 He payeth the Debts, and reneweth the Lease for a further
 Term: It being a Church Lease, and offered to account
 if any Profits would arise out of the old Term.

But

But Sir John King prest that he could not be charged further; for if he pay the Debts to the value, then the Property is altered, and vested in him, in his own Right.

Lord Keeper. The Executor shall make no advantage to himself, and shall account for the new Lease as well as for the old: Did the Executor acquaint the Church with his Case, and did he declare that he would renew, and take it for the time of the old Term, to the benefit of the Creditors and Executorship, and the rest for himself? By the French Law no Church-man can make a Lease to any but the old Tenant, unless he first be refused by the old Tenant.

Lord Keeper decreed accordingly.

Anonymus. *The same Day.*

Purchaser
protected.

Purchaser of Land incumbered with a Statute, purchaseth in a precedent Statute, having no notice of the first Statute.

Lord Keeper. If he had no notice of the second Statute before he was dipt in the Purchase, he shall defend himself by the first Statute, whether the same were paid off or no, if he can at Law do it, Equity shall not hurt him.

Jefferson and Dawson, on Plea, &c.

*Ista respons'
capta, where it
was a Plea.*

An Answer and Plea taken by Commission, was returned *Ista respons' capta fuit per Sacrament', &c.* So the Plea was not on Oath, and therefore rejected, but without Costs, because the Lord Keeper apprehended it as the fault or Neglect of the Commissioners who took it, rather than of the Defendant.

Witness demur.

A Witness demurred to an Interrogatory, because he claimed Interest in the Land, and disallowed because he did not swear to the Interest, nor what Interest he claimed.

Duke

Duke *contra* Duke. 1675.

THE Bill supposed a Settlement on the Plaintiff in Settlement.
Remainder after the death of Elizabeth his former
Wife, and on certain Conditions depending on that Estate
of Elizabeth, and to examine Witnesses to those points: The
Defendant sets forth a Settlement subsequent to the time,
pretended for the first Settlement on a second Marriage,
and Issue of that Marriage had fifteen years since; and
the Plea allowed; for it was alledged at Bar, that in truth
this Bill was but an Artifice to examine the second Mar-
riage, which whether it were not in the life of Elizabeth the
first Wife, and so to Bastardize the second Children.

Lord Keeper allowed the Plea.

Warman *contra* Seaman; &c.

Nathaniel Burton settled the Lands in question for 100 Tail.
years, to William Warman and Julian Ux. for 100 Trust.
years. Julian survived, and granted the Term to Penrose
and Thomas Warman, on trust, in these words: That the
said Penrose and Thomas Warman, their Executors, &c.
should suffer Julian to receive the Profits thereof during
her life, and for so much of the said Term as should be un-
expired at the time of her death upon like Trust and Con-
fidence that They, their Executors and Assigns, or the Sur-
vivor of them, will and shall, upon any reasonable Request,
assign All, and all their Interest and Right in the Premises,
to the Issue of the Body of the said Julian; and for want
of such Issue upon like Request, They, their Executors,
Administrators and Assigns, shall assign all their Interest
then to come to George Warman and William Warman,
Brothers of the said Julian.

Julian had Issue Eleanor, and died: Eleanor died without
Issue; the Plaintiffs Title was under the Brothers, the
Defendant's under the Administrator of Eleanor.

At the first hearing the Lord Keeper decreed for the Plain-
tiff, but on a second hearing obtained by Petition he re-
ferred the Matter in Law to Justice Rainsford, who certi-
fied his Opinion for the Defendant, having heard Counsel
on both sides.

And now, viz. the 16th of Decemb. 1675. gave his Judgment accordingly, and dismiss the Bill.

Lord Keeper. At the former hearing, I looked on Seaman as one who had, by occasion of being Solicitor in a former Cause, thrust himself into the Title, which made me hold him to all strictness; but on the second hearing, I find him a real Purchaser, and at first as though Possession had gone against him all along, which appears otherwise; so those two Circumstances laid out of the Cause, it resteth on the matter in Law, in which also my Opinion was against the Defendant, for these Reasons:

1st. That the Limitation of the Issue of Julian is to be taken as to a Purchaser, and consequently carrieth but an Estate for life to the Issue, and the Conveyance or Assignment to be made to the Issue, though for the Term to be interpreted for the life of the Issue, as in Wild's Case, 6 Co. and otherwise all the Issues must have taken jointly, and not successively: But referring it, the Judge hath certified his Opinion to the contrary, and not only that it was his Opinion, but as he informed me, that it was the Opinion of all the Judges with whom he had conferred, and gave Reasons for it, which I will be made part of the Order, and am content to err in such Company.

Reas. 1. The whole Term was to be assigned to Julian, and then there can be nothing left for the Brothers; but this Reason is *Petitio principii*.

Issue.
Exposition.

And I am not so much moved therewith as was said by the Defendant's Counsel, viz. It was a contingent Limitation, if I have Issue, the whole Term to my Issue; if no Issue, to my Brothers.

Reas. 2. That the Remainder to the Brothers after a Limitation to the Issue of Julian, is a void Limitation; for if it be taken as a Remainder to the Brothers, then they may not take it till all the Issue of Julian, and their Issues also be spent: Issue includes all, and is *Nomen collectivum*, and an Estate for life of a Term devised to A. and after to the Issue of A. and for want of Issue of A. to B. It was adjudged a good Remainder to B. in the King's-Bench lately, but reversed in *Camera Scacarii*, on Error brought, and a difference taken between such Limitation to Children and to the Issue; and cited Pears and Reeves's Case in point.

Strickland

Strickland *Vid. contra* Coker.

Coker was seised for Lives of the Prebend of Alton, being a Church-Lease, in trust for Robert Strickland an Infant, on a Treaty of a Marriage to be had between the Infant and the Plaintiff, and 1000*l.* Portion to the Infant's use.

Guardian of an Infant bound in his own Estate by Covenant of the Infant: The Guardian being Party to the Indenture. Infant. Agreement.

An Indenture was made with the consent of Coker Guardian, or pretended Guardian; whereby the Infant covenants that the Lease should be surrendered, and a new Lease taken, and the Wife's life therein for her Jointure: But though Coker sealed the Indenture, yet there was no Covenant or Agreement on his part, but was made Party only to shew his consent. The Marriage was had, the Portion paid, the Husband died, the Lease surrendered, and the Wife's life put in.

The Widow sued Coker to assign for her life, and decreed accordingly; and Coker pretending the Trust was in the first place to pay Debts to him, it was decreed the Debts should be paid out of the Trust after the Widow's death.

The Decree was affirmed on a Re-hearing.

D E

Term. Sanct. Hill.

Anno Regis 27 & 28 Car. II.

In

CANCELLARIA.

Taylor *contra* Dabar. 1675.

Covenant to
make further
Assurance.
The Land
evicted.
Covenantee
purchaseth it.

A Purchaser of the Crown-Lands in the time of the late War, sells part to the Plaintiff, and covenants to make further Assurances: He on the King's Restitution for 300 l. had a Lease for years made to him under the King's Title.

Decree was he should assign his Term in the part he sold.

Sir Hugh Windham and Sir Robert Atkins
Plaintiffs; Henry Lord Richardson, Bayly and
others, Defendants.

The Case was.

T Thomas Lord Richardson seised in Fee 1663. acknowledged a Statute of 1000 l. to J. S. and the 20th of June 1665. mortgaged the Manor of Ashwood in the County of Norfolk to the Plaintiffs, for 2000 l. and the 22d of June 1665. two days after mortgaged part of the same, and other Lands, (as was at first apprehended) to the Defendant B. The Mortgagor dies: Henry is Heir. Bayly the second Mortgagor agrees with Marshall another Defendant, Executes the same Manor to C. and after Mortgages part of the said Mannor and other Lands, to D. D. the second Mortgagee purchaseth in B's Stat. The first Mortgagee shall not be admitted to set aside the the Extent on payment of what is due on the Stat. without payment of what is due on the second Mortgage also.

cutoz

cutor of the Conizee, to put the Statute in Execution at his Costs, and to pay Marshall the Debt due on the Statute, after such time as the Statute should be extended, and an Assignment made thereof by Marshall to Bayly; the Statute is extended in August 1672.

The Plaintiffs Bill is, that paying the debt on the Statute, it may be set aside and assigned to them, and a Decree against Richardson to pay, &c. or to be fore-closed of Redemption. Bayly in his Answer acknowledges the Money on the Statute, viz. 1200 l. not yet paid, but offers to pay it on assigning of the Extent.

The question is, whether the Plaintiffs shall be admitted to set aside the Extent on payment of the 1200 l. without payment of the 2000 l. due on the second Mortgage, till the Statute is satisfied, according to the extended value, and not according to the Justice of the Debt in Equity?

Object. 1. The second Mortgages are in such case protected against a former Mortgage only on this reason, Because they are intituled to Equity by laying out their Money truly on their Mortgage, and are intituled in Law by purchasing in the former Incumbrance; so that having Title in Law and Equity, he that hath only a Title in Equity shall not prevail against Law and Equity: But Bayly hath no Title in Law; for though the Statute be extended, yet it is not assigned to him, and he hath not yet paid the 1200 l. and the Plaintiffs are ready to discharge him of that: And so offer.

Object. 2. The Defendant hath in his Mortgage made after the Plaintiffs Mortgage, not all the Lands mortgaged before to the Plaintiffs, but only part thereof, and the Statute covereth the whole: Now if the Defendant may by the Purchase of the Statute thereby defend himself as to what is in his Mortgage, yet he may not defend himself against the Plaintiffs, as to such Lands as are not in his Mortgage: As if A. acknowledge a Statute to B. A. being seised of the Mannors of E. and C. and after A. mortgageth E. to one, and C. to another; if E. purchase in the Statute, he shall secure himself against all Men so far as his own debt is, and also as to one Mortgage but not to both.

The Lord Chancellor was strongly of Opinion against the Plaintiffs in both points, but some question of Fact arising, viz. Whether any of the Lands mortgaged to the Plaintiffs were in the second Mortgage or no? The Cause was put off on Propositions.

Note,

Witness.

Note, If a Man be named Defendant who is proper to be a Witness in the Cause, the Plaintiff must by order strike out his name before Answer, but after Answer he may by order examine him as a Witness, though his name be not struck out of the Bill, if he be otherwise competent, as if he disclaims, or have no Interest, or only as a Trustee.

Cartwright *contra* Pettus. 1675.

Ireland.

Cartwright exhibits a Bill against Pettus: They were Joint-Tenants of Lands in Ireland; the Plaintiff prays an account of the Profits, and a Partition of the Lands.

12 Feb. 1675. The Lord Chancellor declared, that as to the Profits the Bill was good, the Person being in England, for they are in the Personality; but as to the Partition, which was in the Realty, he could not here proceed, for he could not award a Commission into Ireland: And the Bill for a Partition was in the nature of a Writ of Partition at the Common Law, which lyeth not in England for Lands in Ireland.

D E

Termino Paschæ

Anno Regis 28 Car. II.

In

CANCELLARIA.

Charles Price *Plaintiff*, and Elizabeth Morgan
and Herbert Evans *Defendants*.

Giles Morgan, on the Marriage of Cicely his Daughter to Thomas Price, Father of the Plaintiff, agreed to pay to William Price, Father of Thomas, 1000 Marks for her Portion, and William Price the Grandfather of the Plaintiff was to settle Lands on Thomas and Cicely. The Settlement was made, and all the Portion paid but 118 l. 3 s. 2 d. which Giles Morgan did keep in his hands, because the Jointure-land of Cicely was incumbered. William Price, to whom the 118 l. was due, made his Will, and thereby declared that 118 l. should be paid to Henry his younger Son in trust to take off the Incumbrances on the Lands, and made Henry and Ann his Executors, and died Anno 1634.

Mich.

Mich. 1637. Thomas finding the Land not discharged, exhibited his Bill against Giles Morgan his Father-in-law, who owed the 118 l. and Henry who was to receive it; and therewith to clear the Estate, that the 118 l. might be paid, and the Land discharged: To his Bill Giles in his Answer did confess the 118 l. to be unpaid, and that he was ready to pay it; on clearing the Incumbrances the Cause went on to publication, but before hearing Giles died, and made W. Morgan his Executor: But yet Thomas brought on the Cause to hearing, against Henry and William Morgan, Executor of Giles present in Court, (as the Order at hearing recites) that William Morgan consented to pay the 118 l.

Whereupon it was decreed the 12th of October, 15 Car. That Sir Edward Salter take the Account what was unpaid of the Portion, and a course directed for taking of the Incumbrance; and if William Morgan will keep the Money in his hands any longer, he is to pay Interest.

A Report was made, and a Decree drawn up.

Thomas Price dieth, and Henry Price dieth; Charles Price paid the Incumbrance out of his own Estate, and takes Administration of Henry Price's Estate and of William's. William Morgan, Executor of Giles, deviseth by his Will several Lands to his Executrix Elizabeth, and to Herbert Evans Defendants, to be sold to pay his Debts: The Plaintiff prays Satisfaction out of the personal Estate of Giles and William Morgan, and out of the Lands.

Debts.
Trusts.
Executors.

Waste, viz. Devastavit.

1st. Much debate arose, whether the Bill was a Bill of Revivor, or an Original; for after so long time the Lord Chancellor on hearing the Cause, it being then represented as a Revivor, ordered a Dismission: But on second hearing it appeared to be an Original Bill, and the Decree set forth but as Evidence.

2dly. But dismiss Herbert Evans, who was no Executor, but Devisee of Lands to sell to pay Debts; for his Lordship declared that such Provision to pay Debts, did not extend to debts of the first Testator Giles, nor to make Satisfaction out of the Lands, if William Morgan, Executor of Giles, had wasted the Estate personal of Giles to the value of the debt, and so it became the debt of William in Equity, and he while he lived liable in Equity to make Satisfaction to the value of so much as he had wasted, and in consequence
the

the Lands devised to be sold for payment of debts ought to be liable.

Lord Chancellor. Although by the Common Law, when the Executor wastes, his Executor shall not be liable, because it is a personal wrong; it is otherwise here, and the Common Law will come to it at last; and therefore whatever Estate of Gyles is come to Elizabeth, or to the hands of William, which William her Testator wasted the personal Estate of William in the hands of his Executrix shall answer.

But the charge or duty which fell upon William by wasting the Estate of Gyles is not such a debt as is within his Will, when he willeth his Lands to be sold for payment of his debts; for it is not properly a debt by Contract, but a debt or duty arising ex maleficio, which I hold not within the meaning of his Will. Therefore dismiss the Bill as to Herbert, and let the other Defendant Executrix account according to these directions. *Mosely and Maynard's Case* was cited at the Bar.

Anonymus.

IF a Suit be in Chancery for a debt for Rent by Lease Parol or simple Contract, and beginneth within time of Limitation, and be dismissed after the time of Limitation, the Court will not order the Defendant to take no advantage of the Statute of Limitation, See *Boscoven and Boscoven's Case*. But if in such Suit the Party be stayed by Act of the Court, as by Injunction, &c. its otherwise; for the Act of the Court shall do no prejudice, as in *Case of Demurrers at Common Law*. Limitation.
Stat. 21 Jac.

Inglet and Inglet.

Witnesses examined to the damage on breach of Covenant not re-examined on the same Interrogatory, although speaking in the first uncertainty. Re-Examination.

The East-India Company contra Mainston, to have an Account of his Imployment, and charged him with divers Deceits and Omissions in his Books of Accounts, which he had sent and delivered: To which the Plaintiff pleaded. The Case on the Plea was, viz.

*East-India
Company.*

THE Company had one chief Factory at Bantam, and other inferior Factories, as at Jambee and other places in which the Factory, viz. their Agent and Council there had power to place other Factors and Chiefs, and to inspect their accounts, place and displace them. Bantam Factory and Council placed the Defendant chief Factor at Jambee, who acts in that Service six years, and then gave his account to the Factory at Jambee, which was there allowed, and then was again re-examined by the Chief and Council at Bantam, and sent to the Company here: And here the Company drew many Exceptions to the Defendant's accounts in Writing, and sent them to the Factory at Bantam to inspect and examine, which they did; and on full perusal and examination thereof they allowed the accounts and disallowed the Exceptions, and made a balance of Money due to the Defendant, and charged the Company here with Bills of Exchange to pay it. The Defendant returned into England; the Company paid part of the Bills of Exchange, and delivered to the Defendant divers Goods of the Defendants, as Pepper, &c. but now sue for an account, suggesting the same Errors and Deceits formerly taken and examined, and disallowed: To which the Defendant pleaded the Matter aforesaid, and that rested quiet till he pressed for the residue of his Money due on the account and Bill of Exchange, and farther that divers of his Vouchers were forceably taken from him by the King of Jambee a Heathen; and his Books and many of his Vouchers delivered up to the Factory at Bantam, without which he could not account; but the Company now offered that he should have the use of his Books.

The

The Lord Chancellor disallowed the Plea, and that the Defendant should answer; for he said that this differed from other Cases, for it was a National Cause and Concernment, and nothing should discharge the Factors in India but a Release or discharge from the Company its self, else their Agents may by mutual connivance ruine the Company.

Another Point was the Company imposed a great Value on Commodities, prohibited by their Agents to be traded in, viz. five, six, or seven times the value; yet the Defendant ruled to answer though it were a Penalty.

D E

Term. Sanct. Mich.

Anno Regis 28 Car. II.

In

CANCELLARIA.

Noy *contra* Ellis.

Mortgagees.
Heir.
Administrators.

B Olistow mortgaged Lands to Joseph Noy and his Heirs; the Condition was to pay the Money at a day to the Mortgagee his Heirs, Executors, Administrators or Assigns; the Money was not paid, the Mortgagee entred and died; three of the Defendants, as his Heirs entred; Julian, Wife of the Mortgagee, takes Administration, then brings a Writ of Dower against the Heirs; and others bring Actions of debt against the Heirs on Bonds, wherein the Mortgagee bound him and his Heirs; the Wife exhibits a Bill against the Heirs and the Mortgagee, that the Mortgagee may redeem, and the Heirs reconvey to the Mortgagee, and that she as Administratrix may receive the Money; and decreed accordingly.

The Objections against the Decree were, viz.

1. The Condition was to pay to the Heirs, Executors, &c.
2. The Mortgagee had entred, and by his Act, as far as in him lay, made it part of the real Estate.
3. The Plaintiff by bringing a Writ of Dower had so done also.
4. There were no Debts, but Assets sufficient with Overplus.

5. Def.

5. Neither were any Children or Portions to be paid.

6. The Law gave the Estate to the Heirs, Sisters of the Mortgagee, and the Administratrix came not in by the Act or disposition of the Mortgagee; and it were hard to take away a legal Estate from the Heir to give it to an Administratrix, who ought to be less favoured than the Heir, who always must be of the Blood. An Administration may be to a Stranger, and whether he be or not, his Title is the same only by the Ordinary.

The Precedent between Tilly and Egerton and others was cited.

Notwithstanding the Lord Chancellor decreed ut supra. He said he had considered all the Precedents, and held no difference where payment was to be to the Heirs and Executors, &c. or to the Executors only: But in Case the Money had been paid at the day of payment to the Heir, there it was well to the Heir; but if it were not at the day then, it should return to the personal Estate, for it came from thence, and should return thither again, and said, it was needful that Point should be settled; and no matter what the Law is, so it be certain, as Chief Baron Walter said; and concluded all Mortgages pertain to the personal Estate though made in Fee.

Culpepper and Austin. Austin contra Culpepper.

SIR Thomas Culpepper the Father, the 29th of February, 1642. by his Will in writing devised, That if all his debts might be paid out of his personal Estate, or out of the Rents and Profits of his Lands, then Henry Culpepper his Brother, and Sir Nicholas Crisp, who he recited to be estated in his Lands in trust should convey his Lands to the Plaintiff, his Son, at his age of one and twenty years, and receive the Profits in the mean time, and made them Executors and dyed, the Plaintiff, his Son and Heir, being an Infant.

And supposing the Executors had raised sufficient to pay the debts. 1655. he exhibited his Bill against the Executors to have the Lands, being one and twenty years of age. This Bill was not prosecuted divers years, and was grounded only on the Will, which in truth was revoked by a Deed made by Sir Thomas Culpepper in March following in trust, whereby the Lands were conveyed to them

them and their Heirs to sell to pay his debts ; for by the Will the Executors had only an Authority to sell, and that of two parts ; by the Deed they have the Estate not only of the two parts, but of the whole ; and there were other variances in the trust limited in the Will and Deed.

In 1660. the Plaintiff Culpepper exhibited a second Bill against Henry Culpepper, the Executor, and others to the same effect.

And a third Bill against Henry Culpepper the Executor, and Sir Robert Austin, to the same purpose ; but herein charged not only the said Will, but that the Defendant pretending to the Lands some Title by some other Deed or Will had entred, &c. and prayed an Account.

Sir Robert Austin by Lease and Release dated the 16, 17 July, 1661. by advice of Serjeant Broom on perusal of the Deed made the 9th of March, 1642. after the Will (but it seems he was not acquainted with the Will) for a full consideration, viz. 1120 l. (actually paid, 900 l. and the rest then secured) did purchase the Lands in question being not worth above 55 l. per annum ; at this time Sir Robert Austin was named Party in the last Bill ; no Process taken out against him till November, 1661.

Sir Robert Austin answered and died, Sir J. Austin, his Son and Heir, exhibits his Bill for Relief, supposing Collusion between the Uncle of the said Heir and him ; and in truth the Answer of the Uncle to the last Bill came in the 17th day of June, 1661. the same day wherein Sir Robert Austin purchased, and paid his Money ; and the serving Process on Sir Robert Austin in November after ; and it was proved that the Plaintiff offered Henry Culpepper Son of Henry, the Uncle, that he would quit his Father, Henry Culpepper, of all Accounts, and release him if so be he would comply with him in the Accounts ; for he said he intended to lay the burden upon Austin, and if he would so do he should not want for 200 Angels ; but the same witness on the other part swore he did not accept thereof, but faithfully managed the Account, Culpepper's Bill being brought to an Hearing against Austin.

The Lord Chancellor Ashly heard that Cause, and on hearing several Orders made in Austin's Cause, directed an Account with special directions (inter alia) an Account made by the Uncle in presence of the Plaintiff to be considered.

Now

Now Austin's Cause coming to be heard by the Lord Finch many things were moved, and that this Cause could not receive any final determination till the Accounts before the Master were settled, which depended by several Exceptions taken by Austin, whose Bill was not brought on by him, but by the Defendant Culpepper, Plaintiff in the other Cause.

There were divers things agreed and resolved: 1. That *Trust to sell:* by the Trust in the Will to sell, the Purchaser did purchase at his own peril, if the personal Estate and Profits of the Land received were sufficient, and afterward became insufficient.

2. But if the Trust were as in the Deed, the Purchaser was safe; for the Vendor is liable, not the Purchaser. If the Conveyance be to sell to pay debts, it pertains not to the Purchaser in such Cases to enquire if the debts be satisfied, especially when no Schedule of debts is made to ground his Enquiry on, else no such trust could ever be executed.

3. But in this Case the Heir (who is intituled to the Lands after sufficient is raised, to have the Lands by a trust implied, and a trust resulting on construction of the trust though not express) doth attach his Claim by exhibiting his Bill, and then no Man may purchase after the Bill *Lis pendens:* And when the Bill was exhibited against Henry Culpepper, the Trustee, it will bind him and all claiming under him, *pendente Lite*; and it was improvident Counsel to make Austin Party to give him occasion to question the account, and however now the account must go on. *Nota, No Process then served.*

But I objected, that then it will lie in the power of the Heir to hinder or delay Sale or payment of debts, for he may exhibit a Bill when he will, and no Man can tell what the Event will be at the end of the Suit.

Anonymus.

Anonymus. 19 December 1676.

Parliament Privilege.

Barons Widows.

But 1676. resolved in the Lords House to the contrary, that the Widows had Parliament Privilege.

THE Lord Chancellor Finch declared, that it was lately resolved by the Lords in Parliament, that the Widows of Peers ought to have no Privilege of Parliament, because they are not to be called to Council; and cited the Lady Mohun's Case, though formerly they had been allowed it; but they are to have Privilege of Peers, not to be arrested.

D E

Term. Sanct. Hill.

Anno Regis 28 & 29 Car. II.

In

CANCELLARIA.

Sims *contra* Urry. 25 January 1676.

THE Plaintiff had a Bond of 40 l. quadragin- 40 l. Bond to pay
ta libris, to pay 200 l. which should have been 200 l. aided.
quadringentis. The Defendant was sued in The Heir
Chancery as Heir and Executor to the Obligor, charged,
the Obligor having bound him and his Heirs. The and charged here
Plaintiff had relief, though the Defendant offered to as by Judgment
admit the Bond to be 400 l. and so try it. at Law he should
have been.

The Lord Chancellor decreed an Account before a Ma-
ster of the Profits of the Land from this time, viz. of the
Decree, because the Defendant offered not so in his An-
swer, and at Law on Oyer, the Variance would appear :
Yet the Defendant offered not to demand Oyer of the
Bond at Law ; but it was now too late objected, the Heir
could not be bound but by writing, and this Writing binds
him but in 40 l. and the Executor could not pay it without
a Decree, without a Devastavit to other Creditors.

Lord Chancellor. When the Plaintiff hath Judgment
here, he shall have the same advantage as at Law.

Perkins *contra* Avery, Brown and Baker.

Theophilus Perkins, whose Executor the Plaintiff is, possess of certain Pieces of Hangings, put them into the hands of Avery an Upholsterer to sell for him; but having occasion for money, desired Brown, who was a Scrivener, to lend him 500 l. which he did on the Hangings, and enquired first of Avery, who was his Cousin and Neighbour, of the value of the Hangings, who informed him of the value: Afterwards Theophilus Perkins borrowed on the Hangings 100 l. more, and gave a Judgment also for the Debt with Interest, the Hangings being still in Avery's hands. Avery sold the Hangings at an under value, but whether Baker or Brown knew of the Sale? they pretended they did not, and denied that they knew: But Avery after his Sale desired the Plaintiff, then Executor of Theophilus Perkins, to sell them; who refused so to do unless he might first see them, but could not; the money lent by Brown was Baker's, for whom Brown dealt as Scrivener, as they said; but the Plaintiff, nor Theophilus Perkins his Testator, did not know thereof, nor did Baker appear therein, tho' the Securities were in his name: The Plaintiff paid the Money and Interest; the Note for Judgment, and for the Mortgage of the Hangings, were always in Brown the Scrivener's custody, and on payment of the money delivered up to the Plaintiff: But the Hangings being sold before, could not be had; and Brown said he had nothing to do with Avery, (as one Witness deposed at the payment, &c.) The Plaintiff exhibits his Bill to have the Hangings, or the value in money. On a Trial against Brown, Baker and Avery, directed by the Court, the value of the Hangings was found to be 800 l.

The Lord Chancellor decreed the Defendants to pay the money.

Brown and Baker petitioned to be re heard, and that the Decree might be explained as to them only; that there was no reason to charge them, for they put not the Hangings into Avery's hands, but they were placed in Avery's hands with power to sell them by Theophilus Perkins, and they ought not to be charged by Avery's default.

But

But my Lord Chancellor on long debate affirmed his former Decree; for by the Sale and Mortgage Perkins divested his Property, and the Goods became Baker's, and Avery became Trustee for Baker, and he must answer for his Trustee Avery, who did sell them after the Mortgage.

And though Brown pretends to act as a Scribe only, and as an Agent to lend Baker's money, they are to be looked on as one person as to the Plaintiff; for the Scribe keeping the Securities for Baker, Baker trusted him thereby withal, and he had power to dispose of the monies, and he undertakes the same by keeping the Securities, and shall be answerable as Baker: And now after the long Proceedings, Orders, Reports and Trials, and decree it is too late.

Anonymus. 23 February 1676.

MR. Attorney moved, that a Decree pronounced in Michaelmas-Term, That the Defendant should account, since which the Defendant was dead, might be enrolled. Decree enrolled.
Post Mortem.

(Lord Chancellor.) What good will that do you when 'tis but to account?

(Mr. Attorney.) The Decree was not only to account, but for payment of certain Sums.

(Lord Chancellor.) It hath been done, and is so at Law, if Judgment be pronounced it shall be entred, though the Party die, let it be so here now.

D E

Termino Paschæ

Anno Regis 29 Car. II.

In

CANCELLARIA.

Craker & Ux. contra Parrott & Ux.

The Case on Proof.

Richard Spior, a Citizen of London, had Issue four Daughters, viz. the Plaintiff by his first Wife, and three Daughters by the Defendant his second Wife; and by his Will devised in these words, (having given thereby several Legacies:)

As to the rest of my Estate, One third part is due to my Children equally; therefore my Will is, that the Portions that I gave in advancement of my married Children, shall be accounted in their Shares to make their Shares equal with my unmarried Children; One other third part belongs to my Wife, and the other third part which I have power to dispose; the Legacies by me given thereout deducted, I do intrust my Wife with, during the time she shall continue my Widow; and in case she shall re-marry, I do will and desire her to give unto my Children the Remainder of my Estate, according as she shall think fit, and dieth.

The Widow marieth again, the Remainder of the thirds after Debts and Legacies, was 1670 l. &c. The Executrix after her Marriage, by writing recites, that her Daughter
Mary

Mary, who had been married by her, and her former Husband, against her own Inclination, and her the said Mary's Husband left her one Child and no Maintenance, and was gone away; therefore she appoints to Mary 1074 l. to the Plaintiff 50 l. to the other two Daughters 257 l. apiece; so as Mary had 21 times as much as the Plaintiff, and the other two Daughters five times as much.

The Bill complains of this unequal Distribution, but was dismissed by Mr. Justice Jones; but an Appeal was now to the Chancellor, who re-heard the Cause, and set aside the Distribution as done contrary to the Trust which was reposed in her by her Husband.

The Points debated at the Bar were;

1st. Whether the power left to the Wife was not determined by her Marriage, for the words are express, that he intrusts her for so long time, viz. as she shall continue his Widow; therefore she having no power but by this Clause, she cannot have the Power or Trust longer than she continueth his Widow.

To which it was objected, That her Power to dispose was, if she re-marry, to give, &c. so she must re-marry, and then give, &c.

Resp. The occasion of disposing is in case of Marriage, which she may do before; as a power to limit a Jointure to a Wife may be executed before Marriage, if Marriage follow: And reason was for to trust her no longer than while she continued a Widow; for when she married though she might direct, yet all the Estate falls under the power of her Husband.

2dly. Admitting her power ceased not in point of time by her Marriage, yet so great Inequality shewed so much Partiality to her own Children above the other Child, the Plaintiff, to whom she was a Step mother, as that the Court ought to regulate it: Which it was urged the Court had power to do, and to dispose, as the Father, if asked, would have done; and the rather in this Case, for that the Father when he published his Will, declared to his Wife what he had, and left her no charge but the Plaintiff, and she said she would be kind to her, and deal with her as her own; and often in her Widowhood said, the Children should be equal.

This was much opposed, but my Lord Chancellor said in effect, that he went on other Reasons than were touched on at the Bar; he considered not the Case as matter of Power,

Power, but as a Trust in the Wife, which was to keep the Children in obedience to her while a Widow; but when she should marry, it was likely that the Reverence of the Children would not be so much as before; and therefore though he trusted her for the Children equally before, yet when she should marry he seems to give her a more arbitrary Power; but that doth not make the Children rightless.

Then was moved, there could be no Decree, because the other Daughters were no Parties.

Resp. They may come in before the Master, or however we desire but that this Distribution may be set aside.

D E

Term. Sanct. Trin.

Anno Regis 29 Car. II.

In

CANCELLARIA.

Elliot *contra* Elliot. 3 July 1677.

THE Grandfather Mortgagē, purchaseth to him Son trusted by self the Equity of Redemption; and having two the Father. Sons, the eldest took ill Courses, and had killed a Man: The Grandfather and the Mortgagor joined in a Conveyance to Thomas his youngest Son, but no Consideration exprest, nor Trust exprest; but the Grandfather continued in Possession, and leased, received the Rents, and by his last Will devised the Lands to Thomas, but exprest not for what Estate, and died.

The Question was, Whether the Conveyance to Thomas should be taken to be in trust for the Grandfather, according to the usual Rule, or no? And the question arose between the Son of Thomas, and the Heir at Law.

Against the Heir at Law, and to make it no Trust:

1st. Where the Father purchaseth in the name of his Son, it hath been frequently decreed to be an Advancement and not a Trust, though the Father take the Profits and keep Possession; and though the Father after such Purchase declare the Trust, yet it is not good unless the Trust be declared before or at the time of the Purchase.

And so now the Lord Chancellor agreed,

2^{dly}.

2dly. It was objected, that the reason why this Court had so as before decreed, was in pursuance of the reason of the Common Law: A Feoffment is made by the Father to the Son generally, no use riseth back to the Father, unless it be exprest.

3dly. The Will expressing no Estate, contradicts not the Rule; but one Witness doth exprestly depose, that the Grandfather's Direction was to devise, &c. to Thomas and his Heirs: And another Witness deposed ad idem, to the best of his Remembrance, and as he believed, which was not prest as if such Parol Declaration could enlarge the Will, but as an Evidence of the Trust and Intent; and there was reason to do so, because of the disorder of the elder Son.

But the Lord Chancellor decreed it a Trust for the Grandfather, and took the Difference between a Son formerly married and provided for, and between a Son unprovided for. In the latter Case, if the Father purchase Land in the name of a Son, and pay for it, or convey Land to his Son, it shall be taken not to be a Trust ut supra, but to be an Advancement or Provision for the Son, because the Father is under an Obligation of Duty and Conscience to provide for his Child in such case; but after he hath provided for him, he is under no farther Obligation to provide more than for a Stranger, and else no Father could trust his Child: And this difference I take, and shall always observe, and the Proof is defective to alter the Case.

Anonymus.

Foreign Attachment.

EDward Turney was indebted to Edward Denham by Bond, and took of him divers Wares to barter and trade for in the East-Indies. Turney in his return homeward dieth Intestate, possess of divers Goods in the Ship. Daws possesseth himself of the Goods, and Moyer gets them into his Possession. Anthony Turney takes out Letters of Administration, and he brings a Bill, Hill. 1673. against Daws and Moyer to discover the Estate. 13 March 1673. Moyer enters a Complaint before the Mayor, &c. of London, against the Administrator, on a Bond for Money, wherein Edward Turney the Intestate was bound to him, and hath Process thereon. The Officer returns that he had attached Anthony Turney

Turney by Goods (naming them) in the hands of Moyer, which were the Intestate's, and immediately Process on 14, 15, 16, 17, the same days of the same Month of March, and the Goods condemned in four days. Denham sueth the Intestate at Law, and by Nihil dicit obtains Judgment on the Bond. Daws doth the like on another Bond; but these Judgments were after the Judgment on the Foreign Attachment, and pending the Suit in Chancery by the Administrator: But Denham after exhibited a Bill against Turney the Administrator, and Daws; but Moyer was no Party to that Suit, and Daws had a Suit there against Turney, Moyer and Denham.

All three Causes came to be heard together: Decreed int' alia, for Daws and Moyer, to account for the Estate which came to their Hands, Books, &c. to be brought in, the Estate, over and above just Allowances, to be distributed proportionably among the Creditors, according as by Law they ought to be paid, and that the Judgment in the Foreign Attachment should be set aside, but the Goods returned for Denham's Adventure, to be no part of Edward Turney's Estate. Moyer procures a Re-hearing, and insisted, that his debt being by Bond, as well as the debt to Denham and Daws, it was hard enough on him that the Judgment which he had on the Foreign Attachment was set aside, for he had therein done nothing illegal, and it was lawful for him to secure his debt by any legal Course; but as the Decretal Order is penn'd, he shall not only lose the benefit of his Judgment, being first and precedent in time to the other Judgments, but shall lose his debt; for the other Judgments will be preferred before his debt by Bond, unless he may aid himself by his Judgment on the Attachment: But he declared, and was contented that this Judgment should not prejudice the other debts, but all to be payed ratably and proportionably, so that he might have a Share of the Estate equally, according to the proportion of his debt; but that as now the Order is penn'd, he will be wholly excluded till the debts to Daws and Denham be paid, which may swallow the whole Estate.

Chancellor. If a Suit be begun in Banco Regis, Comuni Banco, &c. no Foreign Attachment for a debt, &c. shall prevent the Judgment of that Court, nor shall it prevent the Judgment of this Court, &c. and therefore I confirm the Decree made, and set aside the Proceedings and Judgment

¶ b

on

on the foreign Attachment : You forsook the High way and mistook it, and went in a By-way, therefore take your chance.

Decree against
one who is not
a Party.

Then it was objected, that the Administrator's Bill was not for payment of the other debts, but only to discover the Estate, and Denham no Party to that Suit of the Administrator, and Moyor no Party to Turney the Administrator's Bill ; but Daws was, and Moyor no Defendant to the Bill of Denham, therefore he could not have any Decree against Moyor as now he hath.

Chancellor. They were all brought to hearing together, and reason was that it should be so ; and on hearing of them, the Justice which was to be done on them all appeared, and accordingly decreed, and you shall not sever them now.

D E

Term. Sanct. Mich.

Anno Regis 29 Car. II.

In

CANCELLARIA.

Hilliard *contra* Gorge, &c.

Ferdinando Gorge, did by Articles sealed to pay Hil- Interest lost
liard the Plaintiffs Father 2100 l. for his Interest decreed.
in a Plantation in Barbadoes, with Covenants to
enter into seven Bonds for the Money, 300 l. each
Bond. Gorge enjoyed the Plantation, but no Convey-
ance made to him; but Hilliard died; and made Speake
and Hely Executors, in trust for the Plaintiff an In-
fant. 600 l. was paid: Hely (five of the Bonds being
due) delivered them up, and takes Bonds of the same
Sums in the name of himself and his two Co-Executors,
and excuseth himself, because Gorge had received a Com-
mission from the King to go to Suranam, &c. And so to
mend the Security, he took five new Bonds; but by this
500 l. Interest was lost to the Infant.

Lord Chancellor decreed the payment to be made accord-
ing to the times of payment in the first Articles; and
Gorge and Hely to be charged therewith, notwithstanding
that Hely had on taking the new Bonds released Gorge of
the Articles.

Bray *contra* Buffield.

Term devised to
A. for life, and
after to the Heirs
of the Body of A.

LEsté for years devised the Lands to his Wife for her life, after her death to the Heirs of her Body, and for want thereof to J. S. and dieth. The Executor consents to the Legacy, the Wife dieth without Issue: The question was, whether the Executor of the Husband or the Wife should have the residue of the Term?

(Pemberton.) Had the Devise been to the Wife, and the Heirs of her Body, the whole Term had been hers, and any Remainder void, and the Executors could have had nothing; but it is devised to her for her life, and afterwards to the Heirs of her Body; in which Case she hath but an Estate for her life, and after to her Heirs, &c. Now the word (Heirs) is a good word of Purchase, and the Heir of her Body shall take by way of Purchase: Put case the Devise had been to the Wife for life, and after to the Heirs of a Stranger, there it should have vested when it fell, in the Heir of a Stranger as a Purchaser.

(Resp.) I suppose he meant that the Stranger, to whose Heir the Devise was made, was dead at the time of the Devise, or at least at the time of the Devisor's death.

(Eise quære.) And why not in this case, when a Will may be expounded two ways, and one Way the Testator's Will and Meaning, will take effect, but not if the Will be expounded the other way, then that Exposition shall be taken, which best stands with the Testator's meaning; for the Wife shall have it for her life, and the Heir after as a Purchaser; but the other way of exposition excludes the Heir: In case of a Freehold limited first to the Ancestor, and afterwards mediately or immediately; the word Heirs are a Limitation; for Heir and Ancestor succeed, but not Heir and Testator of a Term, and the Remainder after the Limitation of an Intail, is void.

Lord Keeper e contra. The Testator meant an Intail to the Wife, which cannot be, because then there should be a Perpetuity of a Term; and though there be difference in words when Land or Freehold is devised to one for life, the Remainder afterwards to his Heirs, mediately or immediately; and where a Term is so devised, the difference is in words, the Testator's meaning is the same, and new Estates,

Estates, Jointures and Settlements, are of long Terms, and a Similitude is between them, &c.

Anonymus. 21 Novemb. 1677.

THE Suit was for Tithes in Chancery: The Defendant being in contempt for not answering, was brought by several Orders to the Bar; and being indeed a Quaker, refused to answer on Oath, but prays to answer without Oath. *Pro confesso. Tithes. Jurisdiction.*

Lord Chancellor did admonish him of the Peril, viz. that the Bill must be taken for true, entirely as it is laid if he answered not; but he saying as before, the Chancellor pronounced his Decree, though Sir John Churchill not being of Council, but Amicus Curiae, said that this Cause for Tithes, especially small Tithes, was not proper for this Court, and had not been used.

Chancellor decreed for the Plaintiff, and refer'd the Valuation to the Master.

Manaton *contra* Squire. *The same Day.*

A Partition between Tenants in Common of a great Waste decreed, though many Reasons tending to great Inconveniences, viz. want of Pasture, Shade, &c. *Tenants in Common. Partition.*

Foster *contra* Denny. 4 Decemb. 1677.

The Case.

DUKE the Father, devised to his Wife, Mother-in-law to his Son, the Custody and Tuition of his Son, an Infant of about seven years of Age and died: The Wife married meanly, viz. her own Servant, and he dying, she married a very mean person, Foster: The Uncle of the Boy gets possession of him, and sends him into France, where he placed him in a Protestant College for his Education. The Court on Information that the Child was eloiigned by the Uncle, sued out a Writ of Homine replegiando, and this day was appointed to hear why the Writ should not be discharged. *Guardian. Homine replegiando.*

Lord

Parliament.

Lord Chancellor. Where there is a Guardianship by the Common Law, this Court will intermeddle and order; but being here a Guardian by Act of Parliament, I cannot remove him or her, but in this and all other the like cases, they shall give Security not to marry the Child, infra annos nubiles, or consent, or be aiding to the Marriage of such, post annos nubiles, during minority, without acquainting this Court therewith; but I cannot restrain the Infant from Marriage, ad annos nubiles, and the Uncle was ordered in this case to send for the Boy home, &c.

Anonymus.

Master of a Ship.
Owner.Merchant.
Foreign Sen-
tence.

A Master of a Ship, so appointed by B. Owner, treats with the Plaintiff to take the Ship to Freight for 80 Tuns, to sail from London to Falmouth, and thence to Barcelona, without altering the Voyage, and there to unlade at a certain Rate per Tun: And to perform this, the Master obliges the Ship, and what was therein, valued at 300 l. and accordingly a Charter Party was made and sealed between the Master and Merchant, but the Owners of the Ship no Parties thereto: The Master deviates, and commits Barratry, and the Merchant in effect loseth his Voyage and Goods; for the Merchandize being fish came not till Lent was past and was rotten: The Merchant's Factor hereupon sueth the Master in the Court of Admiralty at Barcelona, and upon an Appeal to a higher Court in Spain, hath Sentence against the Master and Ship; which coming to his hands, viz. the Merchant's hands, the Owner brings an Action of Trover for the Ship; the Merchant sues in Chancery to stop this Suit, and another Suit brought by the Owner for Freight, claiming Deduction out of both for his Damages sustained by the Master by breach of the Articles by the Master; for if the Owner gives Authority to the Master to contract, or doth allow his Contract, he shall be liable to Loss as well as Gain by occasion of that Contract; and if he will have the Gain, viz. the Freight by the Master's Contract, he shall also bear the Loss; and a Contract made by my Council is as if I make it myself. Indeed in case of Bottomry after a Voyage begun, the Master cannot oblige the Owner beyond the value of the Ship, but this Case is, ut supra, on Contract.

Lord

Lord Chancellor. The Charter Party values the Ship at a certain Rate, and you shall not oblige the Owner further, and that only with relation to the Freight, not to the value of the Ship; the Master is liable for Deviation and Barratry, but not the Owners, else Masters should be Owners of all Mens Ships and Estates.

Keck. If the Owner had been Party to the Charter Party, and covenanted there should be such Proceedings in the Voyage, he should on Non-performance thereof have been liable to the Damages, and the Valuation of the Ship in the latter Clause, viz. obliging the Ship to the performance, would not excuse or lessen the damage, and the Owner by assenting to the Act and Agreement of the Master obligeth himself.

Lord Chancellor decreed ut ante.

The Lady Mary Cope's Case.

THE Lady Mary Cope was found a Lunatick, and on Lunatick. Inspection found so, was committed to Mr. Guy, at the Request of the Countess of Bath; and now Sir Francis Fane her Uncle, and Aunt, their Sister by the half Blood, petitioned the Lord Chancellor for the Custody; first, for that she was nearest in Blood; the Estate was but a Jointure for life, so as no impediment, as in case of Guardianship where Lands may descend: And Nearness of Blood argueth most nearness of Affection; especially Guy being a Stranger: And she could not be thought to design against the life of the Lunatick, and she on her death was best intitled to the Administration of the Estate, and consequently most engaged for the Preservation of it.

Lord Chancellor. It's no question of Right, but of Prudence; and where no Right, there is no Wrong: It shall never in this or any case be committed to any that will make gain of it; and the Sister though she be not intitled to the Estate, yet is concerned to out-live her, for thereby she will be intitled to the Estate, and therefore settled it as before; adding, that the Sister should be called to the yearly Account before the Master.

Then

Then we pressed that Mr. Guy might be stinted, beyond which he might not exceed.

Chancellor. Hope that when the Account is made, then the certainty of the Estate will best appear; the Allowance must be liberal and honourable.

D E

Term. Sanct. Hill.

Anno Regis 29 & 30 Car. II.

In

CANCELLARIA.

Taylor *contra* Rudd. 5 Febr. 1677.

THE Defendant, four days after her Husband's ^{Catching Pro-} death, was asked by the Plaintiff, whether she ^{mise.} would marry again? and he gave her a Guinea to have ten Guinea's for it if she married again. And now she being married, the Plaintiff sued her and her Husband to discover the Promise.

On Demurrer it was insisted on by Sir J. Churchill and others, that it was a Catching Promise, and like to a Wager, which this Court will give no help at all unto, and was gained from her in her Sorrow, and ten for one is not a conscionable Bargain.

(Jones Attorney.) The difference is where it is a Bond Penal, whereon the Jury can give no less than the Penalty, and this Case, where the Jury will as cause is, lessen, &c. The Demurrer was over-ruled, and the Defendant to answer.

Atterbury *contra* Hawkins, &c.

Scrivener not
privileged.

TWO Brothers, in the life of their Father, (R. Jason) agreed by Articles together, That if the Father should leave or convey his Estate to the eldest, he should convey a third part thereof to the younger Son; and if he should convey, &c. to the younger Son, then the younger Son should convey a Proportion, &c. to the elder. The Plaintiff pretends himself by this Bill to be interested in this Agreement under the younger Son, and Hawkins one of the Defendants is charged to know and to discover Incumbrances on the Estate made by the Father, &c. Hawkins demurs, because he was a Scrivener, and knew nothing but as a Scrivener when employed in lending Money, and taking Securities from the Father, &c. and demanded Judgment if he should discover, &c. insisting that it was a general Case concerning all Scriveners, and all Dealers with them, in lending and borrowing of Monies. The Demurrer was over-ruled, and Hawkins put in an Answer. To which Answer Exceptions were taken, and now came to be heard. The Defendant Hawkins hath now set forth in his Answer the Names of the Persons for whom he dealt in this Affair, namely the Bishop of Salisbury and others; so as the Plaintiff might make them Parties who are the Parties concerned in Interest; but he himself disclaimed all Interest, but did not answer what Conveyances he had made, nor for what Sums.

And it was said by Mr. Attorney, Mr. Keck, &c. That this would be a foundation of a Practice of very ill consequence, viz. when that the Party concerned may defend himself, so as coming in by valuable consideration and without notice, he should not be compelled to discover any thing to prejudice or weaken his Title, if he were himself Party to the Bill; yet by a Bill against his Agent, (for a Scrivener in such case is no other) he shall have every thing discovered: And it was said, that the Plaintiffs design was, and his endeavour had been to buy in some Incumbrances precedent to the Assurances made to his Clients, (so he called his Employers:) Besides, the Defendant having disclaimed, the Plaintiff could have no Decree against him, nor any Advantage by his Answer; for no use thereof can be made against any others, and therefore it were better and more proper

proper to make the other Persons, whose Names are discovered in the Answer, Parties, and put them to answer for themselves than the Scrivener, no way interested, but as an Agent for others; and by this way a Man that is a mere Stranger in Interest, and knows only as a Witness, may be drawn in to answer a Bill, and so either prepared to be a Witness, or searched by his Oath what he can say, &c.

(Sollicitor.) By the Order on hearing the Demurrer, the Defendant was to answer, and to discover, but now would bring the same matter into debate again.

Chancellor. The Bill is for discovery, and in effect the Defendant bids the Plaintiff go look; therefore answer what Conveyances himself made, not to the former.

D E
Term. Sanct. Trin.

Anno Regis 30 Car. II,

In

CANCELLARIA

Anonymus.

Redemption
bar'd, but no
Possession to be
decreed.

A Mortgagee sues to have his Money, or that the Defendant be barred of Equity of Redemption. It happened that by subsequent Orders possession was ordered to the Mortgagee, and Contempt prosecuted for not delivering the Possession; and the Defendant who was so prosecuted, set forth in his Examination a Title: And now the Mortgagee would have debated the Title, but not admitted because the Course of the Court is, and the Court can go no further in such a Bill but to take away the Equity of Redemption, and leave the Plaintiff to such Title as he hath, but not to amend it; and this was the true and antient Course, though of late some times the contrary hath been done.

And now the Lord Chancellor agreed thereto, and discharged the Contempt.

Sir

Sir Robert Henly *contra* - - - - - 12 June.

DEcree if a Guardian to an Infant, whose Lands are incumbered with Arrears of Rent to the value of 600 l. and he hath in his hands of the Infant's Estate 100 l. and buyeth the 600 l. Arrears for 100 l. he shall not charge the Infant with the 600 l.

Guardian not
advantaged by
Bargain.

A Writ of Ne exeat Regnum granted in any Case where there is danger of Subterfuge from the Justice of the Nation, though of private concernment.

D E

Term Sanct. Mich.

Anno Regis 30 Car. II.

In

CANCELLARIA.

Moore *contra* Bennett. 14 December 1678.

Notice implicite.

A Makes a Conveyance to B. with power of Revocation by Will, and limits other uses if A. dispose to a Purchaser by the Will: Another Purchaser subsequent is intended to have notice of the Will as well as of the Power to revoke, and this is in Law a notice: And so it is in all cases where the Purchaser cannot make out a Title but by a Deed, which leads him to another Fact, the Purchaser shall not be a Purchaser without notice of that Fact, but shall be presumed cognizant thereof; for it is *crassa negligentia*, that he sought not after it.

D E

D E

Term. Sanct. Hill.

Anno Regis 30 & 31 Car. II.

In

CANCELLARIA.

Wakelyn *contra* Warner. 13 February.

A Man seised in fee devised Portions to several of his Children or Friends, payable at several times by 50 l. per Annum, with which Sums he charged his Lands to be thereout paid, and died. 50 l. one payment incurred due; then the Lands were alien'd by Fine, with Proclamations, five years past: The Debtor sueth here for the whole, and the Decree was for the Plaintiff, for what grew due after the Fine was barr'd by the Fine, but not the 50 l. due before; for a Trust is barr'd by Fine, &c.

Warren *contra* - - - - -

George Warren mortgaged a House in Exon for 3000 years to Boughton, in trust for Francis, Arthur. George died, Thomas his Son took Administration to George, and Francis died, and Hester took Administration to him: Thomas Administrator to the Mortgage sueth Hester Administratrix of Francis; and Boughton to redeem Hester, pleads that it was no Mortgage, but an absolute Purchase; but the Plea was set aside on hearing, December and January 1677. On Re-hearing the Court decreed

Inrollment staid.
Post Mortem.
 Administrator
 obtained.
 Decree, and dies
 Intestate.

decreed the Estate redeemable, but there being other mutual Demands, the Estate was by Decree to be convey'd by Hester, and Boughton the Trustee, to the Six Clerks to be under Disposition of the Court, and a Security of what should be due on the mutual Demands, and Bills to be exhibited for clearing these Demands, and a Master to take the Account of the Mortgage.

The Master took the Account, and certifies the Mortgagee over-paid by Profits 280 l. which was now due to Thomas.

In October 1678. the other Causes coming to be heard, the Plaintiff Thomas made a Proposition that he would quit the 280 l. so as Hester and Boughton would assign the Term and all their Interest therein to him, his Executors and Administrators. Hester in person takes time to consider, and then consents; and the Court by consent of her and her Counsel, and of the Plaintiff Thomas, decrees her quit of the 280 l. and to assign to Thomas, his Executors and Administrators, and Boughton to join, and Thomas to release to Hester and her Heirs his Right, in certain Irish Lands.

Before Inrollment Thomas dieth, his Wife takes Administration to him, and now moved that the Decree might be inrolled, viz. 15 Jan. so as there was no Laches; for there hath no Term passed since October last, when the Decree was pronounced, and the Decree is the Act and Judgment of the Court, the Inrollment the Clerk's business, and the Decree is, that the Land be convey'd to Thomas, his Executors and Administrators, which the Wife now is.

It was opposed;

First, Because Thomas had right but as Administrator to George, which the Wife of Thomas cannot have as Administratrix to Thomas.

Secondly, The Release cannot now be had to Hester, for she is Heir to Francis, and George and Thomas.

The Lord Chancellor denied the Inrollment, for the Title of Thomas as Administrator is gone.

Then 'twas pray'd, seeing that now the Administrator by Suit of Thomas hath benefit, Consideration be had of Thomas his Costs, but denied,

Everard

Everard *contra* Warren.

TH E Defendant on account shall be discharged by his Oath of Sums under 40 s. but a Party shall not by way of Charge, charge another person so.

Everard, Owner of some parts of a Ship, took up several Sums of Money on Bottomy: The Defendant became bound with the Plaintiff for the Money; the Plaintiff furnished the Ship with Merchandize: The Defendant takes the Ship and Goods, and employs them.

Brown *contra* Hamond. 18 January 1678.

TH E Plaintiff sets forth, That he was seised of 300 ^{Fens.} Acres of Land in the Fens, which he demised to Allison at 50 l. Rent for two years, and after at 60 l. Rent. ^{Unreasonable Sale not relieved.} The Lessee covenants to pay all Taxes, 30 l. Tax was imposed, and 3 l. Penalty incurred: The Lessee having sufficient Rent in his hands to pay the 33 l. combined with the Defendant, one of the Conservators, to defeat him of his Inheritance, and forbore to pay the 33 l. The Officers appointed to sell by the Laws of the Fens, sell 100 Acres of the 300 for the 33 l. to the Defendant, a Commissioner: Whereas the 100 Acres were worth 400 l. to be sold.

The Defendant denieth Combination, and pleads to the rest the Statute of Draining, and that the Sale was made according to and by virtue of those Statutes.

The Lord Chancellor allowed the Plea, for he could not relieve contrary to an Act of Parliament, and if he should it would destroy the whole Deconomy of the Preservation of the Fens; and compared it to the Case of a Mortgage of Houses in London of great value, that should be settled by the Judges, according to those Acts made concerning London to be rebuilt; This Court shall not examine any Sale on pretence of Equity.

Note, The Sale is made four Months after default of payment, twice in the year, and their use is to expose first ten, or fewer or more Acres for the Sum in arrear, and so increase till a Chapman offer, &c. and never sell for more than what is in arrear of the Tax and Penalty, and it seems can sell for no more.

Anonymus. 21 January 1677.

On Appeal between Gargrave alias Fan, and -----

Examination in
Chancery used
in Delegates.

THE Judges and Civilians on debate ruled, that the Testimony of one Nevill, who was examined in Chancery between the same Parties, and cross examined there, should be read before the Delegates; though it was objected, that the Appellant here should take the advantage here, which he should have had if he had been cross examined; for cross examining a Witness sets him upright in Chancery, but not here.

Shuter contra Gilliard.

Verdict.

THE Defendant was Servant and Kinsman to Mr. Shuter of the Inner-Temple, deceased; and marrying the Daughter of Harrison, Shuter promised to give or leave to the Defendant as much in Money or value, as Harrison did or should give in Portion to him, and made his Wife Executrix, and died. The Defendant sued the Wife, &c. on the Promise; the Wife exhibited her Bill to discover the truth of the Promise. (for it was, if any, a very unlikely one; for Harrison might give 5000 l. or more,) and to discover what Harrison did give, and found that in truth he had given little, and prayed relief on the Bill; but the Defendant proceeded to trial, and the Promise being a Collateral Promise, and not for Shuter's own debt, and being made but a short time before the Statute of the 24th of June 1677. a special Verdict was found on that matter, and therein it was also found that Harrison had given in Money and value 2000 l. and 2000 l. Damages assess.

There.

Thereupon the Executrix prayed to amend her Bill, and having order so to do, set forth her Verdict, and alledged that the Plaintiff Gilliard made up the value by Jewels, valued and by a Bill which was valued at 1000 l. and was but 30 l. per Annum, and worth to be sold or otherwise, but 400 l. and now prayed relief. To which the Defendant pleaded the Verdict, and that thereby the Promise was found and damages, and that Harrison had given pro ut.

On hearing the Demurrer and Plea, the Plea was allowed, and that no Examination should be had as to the value of what Harrison had given: Notwithstanding the Plaintiff here examined to the value of what Harrison gave, but the Defendant here, as was said in regard of the Order, did not examine thereto, and so should be surprized, insisting on the Verdict, which expressly found the value, &c. Examination.

To which it was alledged, that the main Defence being the Matter in Law, they ought not to be concluded by the other Matter, and offered to read proof to such effect.

Lord Chancellor. Where there is Right and Equity, Forms of the Court and Orders shall not hinder me to examine it; and it was so ordered.

ERRATA.

PAge 29. l. 3. for *whole* read *bold*. P. 33. l. 1. add, and *Eyres contra Jafon*. P. 35. l. 14. r. *precedent*. P. 82. l. 21. for *Commissioner* r. *Commissary*. P. 91. l. 14. r. *every Alienee*. P. 100. l. 13. for *Plaintiff* r. *Defendant*. P. 106. l. 34. for *Plaintiff* r. *Defendant*. P. 109. l. 6. after *Plaintiff* r. *for life*. P. 110. l. 24. dele *Plaintiffs*. P. 111. l. 36. r. *the Testators Estate*. P. 140. l. 19. for *Defendant* r. *Plaintiff*. P. 189. l. 12. for *cannot* r. *can*. P. 191. l. 11. for *between* r. *from*. P. 208. l. 16. r. *two Statutes*, l. 18. r. *second Statute*. P. 233. l. 4. r. *sueth the Administrator of the Testate*. P. 234. l. 7. r. *covenant to pay*.

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